IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERESA J. WILSON, Personal Representative of the Estate of CHRISTOPHER A. WILSON, deceased,

Plaintiff,

v.

CATERPILLAR INC., ET AL.,

Defendants.

Case No. 92-C-743 B

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, and by stipulation of all parties, the above entitled cause is hereby dismissed in its entirety with prejudice to future action.

LAMPKIN, McCAFFREY & TAWWATER

By _____
Bob Behlen
Attorney No: 11222
Bank of Oklahoma Plaza
201 Robert S. Kerr, # 1100
Oklahoma City, OK 73102

ATTORNEYS FOR PLAINTIFF

HOLLOWAY DOBSON HUDSON & BACHMAN

By _____
David Dobson
James Jennings, III
One Leadership Square #900
211 N. Robinson
Oklahoma City, OK 73102

ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT WORTHY, Executor of the Estate of WILLIAM LEON EDWARDS a/k/a WILLIAM LONNIE EDWARDS,

Plaintiff

vs.

BURLINGTON MOTOR CARRIERS, INC. and CAROL ANN FORD

Defendants

NO. 92-C-685-B

ORDER OF DISMISSAL WITH PREJUDICE

Now on this 19th day of April, 1993, comes the Plaintiff Robert Worthy, Executor of the Estate of William Leon Edwards a/k/a William Lonnie Edwards, and the Defendant Burlington Motor Carriers, Inc., who state and represent the claims of the Plaintiff against the Defendant have now been settled and compromised for valuable consideration and move the Court to enter its Order dismissing the claim of Plaintiff Robert Worthy, Executor of the Estate of William Leon Edwards a/k/a William Lonnie Edwards, against Burlington Motor Carriers, Inc. and Carol Ann Ford with prejudice.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, AND ADJUDGED that all claims of Robert Worthy, Executor of the Estate of William Leon Edwards a/k/a William Lonnie Edwards, against Burlington Motor Carriers, Inc. and Carol Ann Ford of whatever kind or nature should

be and hereby is dismissed with prejudice.

S/ THOMAS R. BRETT

HON. THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

DON R. ELLIOTT, JR.
Attorney for Plaintiff

MERL A. WHITEBOOK
Attorney for Plaintiff

WM. ROBERT STILL, JR.
Attorney for Defendant Burlington
Motor Carriers, Inc.

EDW\sem\MOTION

DATE APR 20 19..

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation, Plaintiff,	)	
vs.	)	No. 91-C-845-B
BILL'S RENT-A-CAR, INC., a Kentucky corporation, and WILLIAM W. MINGEY, an individual. Defendants.	)	

FILED
APR 20 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

Pursuant to the Court's Order entered simultaneously herein, Judgment is herewith entered in favor of Plaintiff Thrifty Rent-A-Car System, Inc. and against Defendants William Mingey and Bill's Rent-A-Car, Inc. in the amount of $14,125.50 plus the amount of $540.00 for preparation of the Verified Bill of Costs and the attorney fee application, for a total amount of $14,655.50, with post-judgment interest thereon at the annual rate of 3.37% until paid.

DATED this 20th day of April, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

31

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES E. SLANE and PATRICIA A. SLANE, Plaintiffs	)
vs.	) Case No. 92-C-241
EXXON CORPORATION and GRACE PETROLEUM CORPORATION, Defendants.	)

O R D E R

Before the Court for consideration is a Motion for Summary Judgment (Docket #50) filed by Defendant Grace Petroleum Corporation ("Grace") and a Motion for Summary Judgment (Docket #52) filed by Exxon Corporation ("Exxon"). The Defendants move this Court to grant summary judgment on the Plaintiffs' claims on the following grounds: (1) Plaintiffs' damages for injury to property are limited to the diminished value of their land; (2) Plaintiffs' claims are barred by the statute of limitations; (3) Plaintiffs' injuries were avoidable and thus their claims are barred by the doctrine of estoppel; (4) Plaintiffs' have no claims relating to 150 of the 160 acres at issue in this lawsuit or, alternatively, those claims are barred by settlement and release; and (5) Plaintiffs' claims for unjust enrichment are not supported by evidence or law.

The undisputed facts in this case are as follows:

1. The Plaintiffs contend that they own 160 acres of land in Creek County, Oklahoma (hereinafter referred to as the "Lawsuit

Lands"). (Plaintiffs' Complaint, ¶2).

2. The Plaintiffs purchased the house and other structures located on the Lawsuit Lands in 1970 for $4,000; however, the Plaintiffs merely rented the land upon which the structures are located until June, 1984, when they purchased the Lawsuit Lands.

3. From 1970 to the present, the Plaintiffs have leased the property to family members. (Deposition of Charles Slane, Exhibit E to Defendant's Motion for Summary Judgment at pp. 35-36).

4. The Plaintiffs first became aware of problems with the groundwater from the Lawsuit Lands on or before August, 1978. (Deposition of Patricia Slane, pp. 26-37, 171-172).

5. The Plaintiffs acknowledge that the groundwater developed a salty taste no later than 1982 or 1983. The Plaintiffs and their tenants quit using the groundwater from the original water well (Water Well #1) for drinking purposes by 1984. (Deposition of Patricia Slane, pp. 42, 117; Deposition of Charles Slane pp. 50, 187-192).

6. After learning of the groundwater problem, the Plaintiffs periodically had the groundwater sampled and analyzed. Each of the sample analysis confirmed the existence of groundwater problems. (Deposition of Charles Slane, pp. 310-311).

7. The Plaintiffs were aware of the problems with the groundwater prior to the time they purchased the Lawsuit Lands in 1984 and they realized the problems would have to be addressed. (Deposition of Patricia Slane, pp. 144-145).

8. Grace Petroleum purchased its interest in the oil and gas

operations on the Lawsuit Lands in 1979.

9. Exxon purchased the oil and gas lease covering the Lawsuit Lands from Grace Petroleum Corporation ("Grace") in 1985. (Affidavit of Gary Burnett, ¶2).

10. In July, 1985, a "Bill of Sale" and a "Contract" involving 150 of the 160 acres of the Lawsuit Lands were signed by Charles Slane, as seller, and Donald Reece, as buyer. (Exhibit J and K to Defendant's Motion for Summary Judgment).

11. On February 6, 1987, the Reeces and Exxon entered into a Settlement and Release covering all claims for groundwater pollution relating to the 150 acres described in the Bill of Sale. (Exhibit M to Defendant's Motion for Summary Judgment).

12. Sometime prior to October 10, 1986, the Oklahoma Corporation Commission ("OCC") was contacted by the Plaintiff's brother regarding the groundwater problem. The OCC tested the groundwater and reported "possible pollution." (Exhibit N to Defendant's Motion for Summary Judgment). The Plaintiffs understood the OCC report to mean that there was possible oilfield pollution to the groundwater. (Deposition of Charles Slane, p. 203).

13. A second water well (Water Well #2) was drilled on the Lawsuit Lands in 1986. The groundwater from this well was also salty and bad. Both before and after the drilling of Water Well #2, the Plaintiffs believed that their groundwater problems were the result of oilfield operations. (Deposition of Charles Slane, pp. 220-221, 229,239,244-246).

14. In 1984, prior to the time that Grace sold the oil and gas

lease to Exxon, the Plaintiffs contacted Grace about their groundwater problems. (Deposition of Charles Slane, pp. 126-127, 131).

15. Sometime prior to June 1, 1987, the Plaintiffs contacted Exxon and made a claim against Exxon for the alleged groundwater pollution. During this initial contact, the Plaintiffs let Exxon know about their water problems and advised Exxon that they felt like the problems were Exxon's responsibility. In response, Exxon wrote a letter stating that it did not believe it had caused any pollution to Plaintiff's water and denying the claim. (Exhibit P to Defendant's Motion for Summary Judgment).

16. Plaintiff wrote another letter to Exxon on June 10, 1987, complaining that Exxon should have paid the Plaintiffs instead of settling with the Reeces. The Plaintiffs also threatened to contact an attorney and pursue the matter in Court if Exxon did not take care of this matter immediately. (Exhibit Q to Defendant's Motion for Summary Judgment). Exxon responded on June 15, 1987, again reiterating its position that it was "in no way responsible for this condition." (Exhibit R to Defendant's Motion for Summary Judgment).

17. Plaintiffs wrote Exxon again on July 23 and September 4, 1987, regarding Exxon's alleged responsibility for the Plaintiffs' groundwater problem. Plaintiff stated that they had contacted three attorneys and that each attorney had advised them that Exxon is in the wrong. Plaintiffs threatened that if Exxon did not respond favorably to their demands, they would "proceed by contacting

attorney, Jack B. Sellers in Drumright, Oklahoma for him to proceed with legal action." (Exhibits T and V to Defendant's Motion for Summary Judgment).

18. The Plaintiffs took no further action with respect to their groundwater complaint against Exxon until they renewed their complaints sometime in late 1990. (Deposition of Charles Slane, pp.285-287).

19. The Plaintiffs drilled another well (Water Well #3) in late 1990. This well did not produce potable water. (Deposition of Charles Slane, p. 285).

20. The Plaintiffs did not hire an expert to investigate the water problem until the fall of 1991. (Deposition of Charles Slane, pp. 273-274).

21. The Plaintiffs filed this lawsuit on March 20, 1992. (Plaintiffs' Complaint).

22. Charles Slane has testified that it is his belief the property can never be restored to its original value. (Deposition of Charles Slane at pp. 172-173).

23. A certified real estate appraiser, Dwain Bearden ("Bearden"), appraised the fair market value of the entire 160 acres with all improvements thereon, in the absence of any pollution, to be $63,000.00, which is based upon a raw land value of $300.00 per acre. Assuming the existence of pollution as alleged by the Plaintiffs, Bearden determined the fair market value of the Lawsuit Lands (and all improvements thereon) would be $50,700.00, which represents a $12,300 diminution in fair market value.

(Exhibit Y to Defendant's Motion for Summary Judgment).

24. The 10 acres of the Lawsuit Lands not involved in the "Contract" with Donald Reece were appraised in 1987 by Frank Keeter. He appraised the fair market value of the 10 acres and the house and all improvements thereon to be $18,000, which was based upon a raw land value of $500.00 per acre. In his appraisal, Keeter stated:

> "[t]he water problem in this area creates a further economic burden on this property. After installing a Culligan water softening system the water is still not suitable for drinking. This situation can cause serious marketing problems. Due to this fact, I am adjusting the market value downward by $2,000.00 (down from $20,000 to $18,000.00)."

(Exhibit Z to Defendant's Motion for Summary Judgment).

25. The Plaintiffs' experts claim that it will cost $5,927,023.00 to clean-up the alleged oilfield pollution to the Lawsuit Lands. (Attachment to Exhibit 2 to Deposition of Jerry Black). The Plaintiffs are seeking money damages equal to these clean-up costs.

The Standard of Fed.R.Civ.P. 56 Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .
>
> "A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a

> full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

Proper Measure of Damages

The Defendants seek summary judgment on the issue of the proper measure of damages for the alleged injury to Plaintiffs' property.

Plaintiffs contend that Defendants' operation of the secondary recovery unit on Plaintiffs' property has damaged the surface of the land and contaminated the natural state of the groundwaters underlying the land so that they are now contaminated by oilfield brine. Plaintiffs seek abatement, damages equal to the clean-up cost, damages for personal inconvenience, annoyance and discomfort as well as damages for injury to property. The Defendants argue that the alleged injury to Plaintiffs' property is "permanent" and therefore Plaintiffs' damages are limited to the diminished value of the land.

In Oklahoma, the proper measure of damages for injury to real property depends upon whether the injury is "temporary" or "permanent." Under Oklahoma law, injuries from an oil and gas nuisance, including saltwater pollution, which are reasonably incapable of abatement or which are practically irremediable are permanent. Branch v. Mobil, Case No. CIV-90-723-R (W.D.Okla. 1992); Arkansas Fuel Oil Company v. City of Blackwell, 87 F.2d 50 (10th Cir. 1936)(injury is "permanent" when its cause cannot be abated by reasonable expenditure); Briscoe v. Harper Oil Co., 702 P.2d 33,36

(Okla. 1985); Conkin v. Ruth, 581 P.2d 923 (Okla.App. 1976)(Damage to realty is deemed to be permanent if irreparable, irremediable, or the remedial costs exceed the value of the property); Ellison v. Walker, 281 P.2d 931,933 (Okla. 1955). Conversely, "[t]emporary damages in the context of an oil and gas nuisance are by definition abatable." Briscoe, 702 P.2d at 36.

The measure of damages for permanent injury to real property is the difference between the fair market value of the property immediately before the injury and that value immediately after the injury. Nichols v. Burk Royalty Co., 576 P.2d 317 (Okla.App. 1977); Conkin v. Ruth, 581 P.2d 923 (Okla.App. 1976); Keck v. Bruster, 368 P.2d 1003 (Okla. 1962). The measure of damages for injury to real property which is of a temporary character is the reasonable cost of repairing the damage or restoring the property to its former condition. Ellison, 281 P.2d at 933. While temporary and permanent injuries may be recovered in the same action, the combined award cannot exceed the total diminution in the fair market value of the land caused by all injuries. Briscoe, 702 P.2d at 37.

In the present case, the Plaintiffs seek damages for permanent and temporary injuries. Specifically, Plaintiffs seek damages for the injuries suffered as a result of the alleged excessive use of the surface and the injuries suffered as a result of the alleged pollution of the ground water.

Plaintiffs' contend that the property and groundwater can be restored. Plaintiffs' expert, Jerry Black, has studied the site and concluded that it would cost $5,927,093.00 to cleanup the

contamination. (Exhibit G to Exxon's Motion for Summary Judgment). While restoration of the property and groundwater may be technically possible, it is impracticable in the legal sense. Branch v. Mobil Oil Corp., CIV-90-723-R (W.D.Okla. 1992)(Order of December 28, 1992, at p. 4). The estimated cost of restoring the land far exceeds every appraisal of the fair market value of the property. Thus, even if the injury or damages to Plaintiffs' property and water could be classified as temporary, Plaintiffs could not recover the cost of restoring the property because that cost exceeds the pre-nuisance fair market value of their property. Id.

The Court concludes as a matter of law that the damage to Plaintiffs' groundwater is "permanent". Id, at p.5. However, a genuine issue of material fact exists as to whether Plaintiffs have incurred damages to the surface of the land that is "temporary" in nature. Nevertheless, Plaintiffs' total recovery for all damages incurred (temporary and permanent) is limited to the decrease in the fair market value of the land caused by the nuisance.[1] To this extent, Exxon's motion for summary judgment is granted.

Statute of Limitations

Defendants also seek summary judgment on all of Plaintiffs' claims on the grounds that such claims are barred by the statute of

[1] Plaintiffs' contend that the pollution of their property has created a potential liability for the Plaintiffs which could cause the property to have a negative value. Plaintiffs have presented no support for this theory that the property now has a negative value. However, the amount of depreciation caused by the alleged pollution is a fact question which must be left to the jury.

limitations.

Claims for injuries to property as a result of an alleged nuisance are governed by a two-year limitations period. Okla.Stat.tit. 12 §95 (1991). With respect to permanent injury to land, the two-year statute of limitations begins to run when it becomes obvious that permanent injury to the land has been sustained. H.F. Wilcox Oil & Gas Co. v. Juedeman, 101 P.2d 1050 (Okla. 1940); Arkansas Fuel Co., 87 F.2d 50; Nichols, 576 P.2d 317; Magnolia Petroleum Co. v. Norvell, 240 P.2d 80 (Okla. 1952). The limitation period begins when the permanency of the damage done becomes "apparent" to the damagee. Gouin v. Continental Oil Co., 590 P.2d 704 (Okla. 1978); Branch, Order of Dec. 28, 1992, at p. 7 (a cause of action for pollution of water accrues when the plaintiff first learns that the pollution has reached the affected water in such quantities as to permanently damage or ruin it). The question of when it became apparent to the plaintiff or would have been apparent to a reasonable person under the circumstances, that the injury and damage to the water was permanent, is a question of fact for the jury. Harper-Turner Oil Co. v. Bridge, 311 P.2d 947,950 (Okla. 1957).

In the instant case, the Plaintiffs filed their complaint March 20, 1992. Therefore, if it was apparent prior to March 20, 1990, that the injury to the property was permanent, the Plaintiffs' claim for such injury is barred. Defendants point out that Plaintiffs have been aware of the problem with the water since at least 1978 and that Plaintiffs filed a claim with Exxon in 1987

regarding the water damage. Plaintiffs contend that it did not become apparent to them that the problem was permanent until after they drilled Water Well #3 in the fall of 1990.[2]

The Court concludes a genuine issue of material fact exists as to when it became apparent that the alleged injury to Plaintiffs property was permanent.[3] This issue must be resolved by the trier of fact and therefore the Defendants motion for summary judgment based on the statute of limitations is denied. Similarly, whether Plaintiffs' claims for inconvenience, annoyance and discomfort which flow from or are a consequence of permanent injury to Plaintiffs' property is a question for the jury inasmuch as this issue is contingent upon when Plaintiffs' claims for permanent injury to their property accrued. Branch, at p.8.

Damages Which Could Have Been Avoided

Defendants seek summary judgment on the ground that Plaintiffs were aware of the water problem before they purchased the property.

If the injury resulting from a nuisance is permanent in character, the purchaser of the property cannot maintain an action for a nuisance for damages to the land after the purchase, since he

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[2] Charles Slane testified: "[F]inally it got to the point after the third well, it was a good indication to me that there was a problem with the water that cannot be corrected." (Deposition of Charles Slane at p. 274).

[3] If the jury determines that the injury is growing progressively greater due to a continuation of the tortious acts, the statute of limitations would only bar recovery for the damages flowing exclusively from that portion of the permanent injury which was obvious more than two years prior to the commencement of the actions. Commercial Drilling Co. v. Kennedy, 45 P.2d 534, 535 (Okla. 1935). Any injuries which became apparent or occurred within the statutory period will not be barred.

takes the land subject to the injury. 58 Am.Jur.2d Nuisance §258, at 861 (1989). One who voluntarily moves to an existing nuisance may not then sue to abate it. St.Louis & San Francisco R.R. Co. v. Stephenson, 144 P. 387 (Okla. 1914).

As set out above, the issue of when the Plaintiffs knew the water was polluted and knew the extent of the pollution is a disputed question of fact which must be resolved by the jury. Therefore, Defendants' motion for summary judgment on the theory of coming to the nuisance is hereby denied.

Ownership of the Lawsuit Lands

Defendants also move for summary judgment on the ground that the Plaintiffs no longer have a claim with respect to 150 acres of the 160 acres which they claim to own. Defendants contend that the Plaintiffs sold 150 acres in July, 1985, to Mr. & Mrs. Don Reece as a result of Charles Slane signing a Bill of Sale and other documents conveying the 150 acres to the Reeces. Defendants assert that, after the plaintiffs sold the 150 acres to the Reeces, Exxon and the Reeces settled all claims for any alleged groundwater damages relating to the 150 acres.

The Plaintiffs claim that the agreement with the Reeces was merely an option contract and that the Reeces did not exercise this option. Plaintiffs also point out that they are the record title holder of the entire 160 acres. Plaintiffs further assert that Patricia Slane was not a party to the agreement between Charles Slane and Don Reece and therefore her interest in the 160 acres is not implicated by the agreement.

The Court concludes genuine issues of material facts exist as to the terms of the agreement and therefore Defendants' motion for summary judgment on this issue is denied.

Unjust Enrichment

Defendants also seek summary judgment on Plaintiff's claim for restitution or unjust enrichment. In Oklahoma, a party may only recover under an unjust enrichment theory by showing enrichment to another coupled with a resulting injustice. Teel v. Public Serv. Co., 767 P.2d 391, 398 (Okla. 1985).

Plaintiffs contend the Defendants have been unjustly enriched by their unlawful use of Plaintiffs' property. Plaintiffs argue that the Defendants "used" Plaintiffs' property by inadequately plugging wells which allowed saltwater to leak from casings of wells and pollute the surface and subsurface waters in plaintiffs' property. Plaintiffs further contend that Defendants were unjustly "enriched" at the expense of the Plaintiffs to the extent Defendants saved money in the operations of the unit by not properly protecting the surface and groundwaters.

Defendants claim they are entitled to summary judgment on this claim because the Plaintiffs have presented no evidence as to the amount of money the Defendants allegedly saved at Plaintiffs' expense. Defendants further argue that if Plaintiffs have stated a claim, they are only entitled to the amount it would have cost the Defendants to acquire the right to use the land to deposit the contaminants.

The court in Branch was faced with facts similar to the

instant case and concluded "there is no logical reason not to permit restitution or an unjust enrichment measure of recovery where a defendant commits a trespass upon the real property of another and appropriates it to his own use." Branch, Order of December 28, 1992, at p. 9.

Based on Branch, this Court concludes that Plaintiffs have properly stated a claim for unjust enrichment. However, the Court does not agree with Plaintiffs' interpretation of the case law regarding the applicable damages.[4] Plaintiffs are not entitled to the amount of money the Defendants allegedly saved by failing to properly plug certain wells. Instead, Plaintiffs are only entitled to the amount of money Defendants saved by failing to obtain the right to use Plaintiffs' land in this manner.

To the extent set out above, Defendants' motion for summary judgment on Plaintiff's claim of unjust enrichment is granted in part and denied in part.

In summary, the Court concludes:

1) the pollution of Plaintiffs' groundwater is a permanent injury;

2) the status of other injuries suffered by Plaintiffs, if any, as temporary or permanent, is a fact question for the jury;

3) the proper measure of damages for any permanent injuries suffered by Plaintiffs is the diminution in value of the land

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[4] The Oklahoma cases involving "savings from expense" all deal with a scenario where the plaintiff has incurred an expense which unjustly results in the defendant being saved from incurring such expense. See e.g. McBride v. Bridges, 202 Okla. 508, 215 P.2d 830, 832 (1950).

caused by the injury;

4) regardless of the status of Plaintiffs' non-groundwater injuries, Plaintiffs' total recovery for injury to the land shall not exceed the total diminution in value of the land caused by the injuries;

5) the amount of diminution in value caused by the injuries to Plaintiffs' land is a fact question for the jury;

6) the date on which it became apparent to the Plaintiffs that the injury was permanent is a fact question for the jury;

7) Plaintiffs are only entitled to damages for injuries sustained in the two years prior to the date the Complaint was filed;

8) genuine issues of material fact exist regarding the agreement between Charles Slane and Don Reece involving 150 acres of the Lawsuit Lands; and

9) Plaintiffs are not entitled to the amount of money the Defendants allegedly saved by failing to properly plug certain wells.

For the above stated reasons and to the extent set forth, Grace's Motion for Summary Judgment (Docket #50) and Exxon's Motion for Summary Judgment (Docket #52) should be and are hereby GRANTED in part and DENIED in part.

IT IS SO ORDERED THIS 21st DAY OF APRIL, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAMS PIPE LINE COMPANY,

Plaintiff,

v.

SKELGAS, INC.,

Defendant.

No. 92 C 396 B

ORDER OF DISMISSAL WITH PREJUDICE

The Court, having before it the written Stipulation for Dismissal with Prejudice signed by all parties to this litigation, finds that based upon the agreement of the parties the Stipulation for Dismissal with Prejudice should be granted, and

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the litigation captioned herein, including all complaints, counterclaims, cross-complaints and causes of action of any type by any party, should be and the same are hereby dismissed with prejudice to the refiling thereof. This Order is entered this 20th day of April, 1993.

S/ THOMAS R. BRETT

THOMAS R. BRETT
Judge of the U.S. District Court

JAD/bjo/9-368
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHRISTOPHER GRANT,

Plaintiff,

vs.

RON CHAMPION,

Defendant.

No. 93-C-300-B

ORDER

Plaintiff has filed a civil rights complaint and a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. However, Plaintiff's motion for leave to proceed in forma pauperis is insufficient; the financial certificate by an authorized official of the penal institution is not filled out.

The instant complaint shall therefore be dismissed without prejudice at this time. The court may reopen Plaintiff's action if he submits the $120.00 filing fee or a properly completed motion for leave to proceed in forma pauperis to the court within thirty (30) days.

SO ORDERED THIS 19th day of Apr., 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

3

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MELVIN EDWARDS, Petitioner,

vs.

STANLEY GLANZ, Respondent.

No. 93-C-137-E

ORDER

In its last order, the court dismissed Petitioner's application for a writ of habeas corpus because Petitioner had not submitted a filing fee or motion for leave to proceed in forma pauperis, and because Petitioner had not exhausted his state remedies. Petitioner has now submitted a motion for leave to proceed in forma pauperis and asked the court to proceed with the determination of his case.

However, the requirement of exhaustion still bars this court from considering Petitioner's claims. According to the petition on file, Petitioner has at least one, and possibly three challenges to his incarceration currently pending in Oklahoma state courts. The exhaustion requirement is based on the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct

alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

IT IS, THEREFORE, HEREBY ORDERED that Petitioner's motion for leave to proceed in forma pauperis is granted. However, Petitioner's action is again dismissed.

SO ORDERED this 19th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOE JOHNSON, JR.,
Petitioner,

vs.

WARDEN MICHAEL W. CARR,
Respondent.

No. 93-C-287-E

O R D E R

Petitioner has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Upon review of the petition, it has come to the court's attention that Petitioner was convicted in Seminole County, Oklahoma, which is located within the territorial jurisdiction of the Eastern District of Oklahoma. In addition, Petitioner is incarcerated within the Eastern District. Therefore, this court does not have jurisdiction to entertain the instant petition. See 28 U.S.C. § 2241(d).

Accordingly, this action is hereby dismissed.

IT IS SO ORDERED this 19th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KIRK ADAM PALSGROVE,
Petitioner,

vs.

RON CHAMPION,
Respondent.

No. 93-C-268-E

O R D E R

Now before the court is Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. It has come to the court's attention that Petitioner was convicted in Comanche County, Oklahoma, which is located within the territorial jurisdiction of the Western District of Oklahoma. Therefore, in the furtherance of justice, this matter may be more appropriately addressed in that district.

Accordingly, pursuant to 28 U.S.C. § 2241(d), Petitioner's application for a writ of habeas corpus is hereby transferred to the United States District Court for the Western District of Oklahoma for all further proceedings.

IT IS SO ORDERED this 19th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EUGENE ALLEN LURKS,
Petitioner,

vs.

DAN REYNOLDS,
Respondent.

No. 93-C-311-E

O R D E R

Petitioner has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Upon review of the petition, it has come to the court's attention that Petitioner was convicted in Muskogee County, Oklahoma, which is located within the territorial jurisdiction of the Eastern District of Oklahoma. In addition, Petitioner is incarcerated within the Eastern District. Therefore, this court does not have jurisdiction to entertain the instant petition. See 28 U.S.C. § 2241(d).

Accordingly, this action is hereby dismissed.

IT IS SO ORDERED this 19th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MALONEY-CRAWFORD, Plaintiff(s),	)	
vs.	)	No: 92-C-632-B
MALONEY-CRAWFORD PROCESS SYSTEMS, INC., et al Defendant(s).	)	

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 19th day of April, 1993.

UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA
THOMAS R. BRETT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH COLEMAN,

Plaintiff,

vs.

TULSA COUNTY JAIL, et al.,

Defendants.

No. 93-C-273-B

ORDER

Plaintiff has filed a civil rights complaint pursuant to 42 U.S.C. § 1983. However, Plaintiff has not submitted the proper $120.00 filing fee or a motion for leave to proceed in forma pauperis. In addition, Plaintiff's complaint alleges his eighth amendment rights are being violated because he is not provided with a smoking area at the Tulsa County Jail. These allegations are patently frivolous and inarguable as a matter of law.

Thus, for all the above reasons, Plaintiff's complaint is hereby dismissed.

SO ORDERED THIS 15th day of Apr., 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT E. COTNER,

Petitioner,

vs.

WARDEN CODY, et al.,

Respondents.

No. 93-C-229-B

ORDER

In response to the court's last order (docket #6), Petitioner has submitted to the court five different letters along with a number of different documents. It appears that instead of taking the time to try to understand and comply with the court's prior order, Petitioner instead barraged the court with letters and documents. Such conduct is not well taken.

In its prior order, the court noted that the instant petition names a 1976 conviction of three years as the judgment under attack, and that Petitioner is clearly no longer "in custody" under that sentence. The court further noted, however, that pursuant to Gamble v. Parsons, 898 F.2d 117 (10th Cir. 1990), the petition can be read as asserting a challenge to his present sentence to the extent it has been enhanced by the allegedly invalid 1976 conviction.

The court required Petitioner to file an amended petition properly reflecting that it is actually his current sentence that is being challenged. The court also noted other defects to be corrected in the amended petition. Petitioner was advised that

failure to comply could result in the dismissal of the action.

Among the various letters and papers submitted to the court since its last order is an amended petition that fails to comply with the court's order in any way. Other papers continue to assert that petitioner did not intend to attack his present conviction, and other papers suggest the court dismiss this case, if the court so judges. Another letter inquires about seeking habeas relief by converting the action to a civil rights action, which is inappropriate and would be barred by the statute of limitations at any rate. Nowhere in the papers is there any suggestion that Petitioner is still in custody pursuant to the 1976 conviction.

Based on all the above factors, the court shall dismiss this action. If Petitioner wishes to contest a conviction of which he is currently "in custody" to the extent that it was enhanced by the 1976 conviction, he may either seek to amend a pending action regarding that conviction, or attempt to file a new action.

IT IS, THEREFORE, HEREBY ORDERED that:

1. The clerk shall not file any of the papers currently submitted to the court.
2. Petitioner's action is dismissed. This case is closed.

SO ORDERED THIS 15th day of Apr, 1993.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JEANNIE L. REED,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

No. 92-C-795-E

O R D E R

Comes now before the Court for its consideration Defendant's Motion to Dismiss Plaintiff's complaint. After review of the pleadings and for good cause shown, the Court finds Defendant's motion should be granted.

This cause results from an automobile accident involving Plaintiff and a third party ("Rizzuto"). Both Plaintiff and Rizzuto were insured by Defendant at the time of the accident. After extensive negotiations, Plaintiff received a $100,000 settlement from Rizzuto pursuant to his liability policy with Defendant. Plaintiff now seeks monies from Defendant under her underinsured/uninsured coverage ("UIC") policy.

The Court finds the State of New Jersey law applies.[1] Allstate Ins. Co. v. Hague, 449 U.S. 302, 101 S.Ct. 633 (1981). The applicable statutory law, sections 17:28-1.1.C and 17:28-1.1.E

[1]The accident occurred in the State of New York, but the contract was entered into between Plaintiff and Defendant in the State of New Jersey and a New Jersey policy was issued.

5

of the State of New Jersey are clear on the issue stacking and the law regarding UIC. Section 17:28-1.1.C provides:

> "Uninsured and underinsured motorist coverage provided for in this section **shall not be increased by stacking** the limits of coverage of multiply motor vehicles covered under the same policy of insurance nor shall these coverages be increased by stacking limits of coverage of multiply policies available to the insured. If the insured has uninsured motorist coverage available under more than one policy, and recovery shall not exceed the higher of the applicable limits of the respective coverages and the recovery should be prorated between the applicable coverages as the limits of each coverage bears to the total of the limits." (Emphasis added).

Section 17:28-1.1.E provides:

> "For the purpose of this section (1) 'underinsured motorist coverage' means insurance for damages because of bodily injury and property damage resulting from an accident arising out of the ownership, maintenance or use of an underinsured motor vehicle. Underinsured motorist coverage shall not apply to an uninsured motor vehicle. A motor vehicle is underinsured when the sum of the limits of liability under all bodily injury and property damage liability bonds and insurance policies available to a person against whom recovery is sought for bodily injury or property damage is, **at the time of the accident, less than the applicable limits for underinsured motorist coverage afforded under the motor vehicle insurance policy held by the person seeking that recovery**. A motor vehicle shall not be considered an underinsured motor vehicle under this section unless the limits of all bodily injury liability insurance or bonds applicable at the time of the accident have been exhausted by payment of settlements or judgments. The limit of underinsured motorist coverage available to an insured person shall be reduced by the amount he has recovered under all bodily injury liability insurance or bonds;" (Emphasis added).

The language of the New Jersey statutes is clear; UIC cannot be increased by stacking the limits of coverage of multiple policies and recovery shall not exceed the higher of the applicable limits of the respective coverages. Here, Plaintiff received a settlement amount of $100,000 from Rizzuto equal to her UIC policy; therefore, under the language of the statutes, Plaintiff cannot recover benefits from Defendant under her UIC. Prudential Property and Casualty Ins. Co. v. Johnson, 568 A.2d 1193 (N.J. Super. A.D. 1989).

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss is hereby granted.

ORDERED this 16th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 4-19-93

FILED

APR 16 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JANE C. BEYER, an individual,	)	
Plaintiff,	)	
vs.	)	Case No. 92-C-1026-E
AMERICAN NATIONAL INSURANCE COMPANY,	)	
Defendant.	)	

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a)(1)(ii), the parties to this action stipulate to the dismissal of this action with prejudice to the future filing thereof.

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Tammy D. Barrett, OBA #14182
HUFFMAN, ARRINGTON, KIHLE,
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ATTORNEYS FOR PLAINTIFF, JANE C. BEYER

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ATTORNEYS FOR DEFENDANT,
AMERICAN NATIONAL INSURANCE
COMPANY

250.93A.MER

DATE APR 16 1993

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAYME LEROY HAYES,)
)
Plaintiff,)
)
v.) 89-C-1014-B
)
THE STATE OF OKLAHOMA,)
)
Defendant.)

ORDER

Now before this Court is Jayme Leroy Hayes' Petition For Writ Of Habeas Corpus. A telephone hearing was held on April 8, 1993 to discuss a January 19, 1993 Order by the Oklahoma Court of Criminal Appeals. That Order denied Hayes an appeal out of time, which exhausted his state remedies. The matter now can be decided by this Court.

In mid-1987, a confidential informant told Tulsa police that stolen property and cocaine was stashed in an apartment occupied by Terry Penn and Hayes. Subsequently, before midnight on June 9, 1987, police executed a search warrant on Penn and Hayes' apartment. Penn, Hayes and another person were present at the time of the search. During the search, police seized 160 items, 152 of which were not listed on the face of the search warrant nor were they included in offense reports listing stolen property.[1]

The evidence uncovered in the search led to the conviction of Penn and Hayes for Knowingly Concealing Stolen Property and Unlawful Possession of a Controlled Drug in Case No. CRF-87-2463, and Knowingly Concealing Stolen Property in Case No. CRF-87-

[1] *Police also conducted a search of a van. That search was ruled proper by the Oklahoma Court of Criminal Appeals.*

2228 in the Tulsa County District Court. The trial court found Penn and Hayes guilty of all charges, sentencing them to five years imprisonment for Knowingly Concealing Stolen Property and 10 years imprisonment for each count of unlawful possession, ordering the sentences to run consecutively. Hayes and Penn were sentenced to five years for CRF-87-2228 to be served consecutive to CRF-87-2463.[2]

On October 27, 1989, Hayes filed a Writ Of Habeas Corpus to the Oklahoma Court of Criminal Appeals, which was denied because "petitioner did not file a direct appeal from his convictions." The state appellate court instructed Hayes to file a motion for an appeal out of time in the Tulsa County District Court.[3]

After the state court denied his writ, Hayes filed a habeas petition in the United States Court in the Western District of Oklahoma on November 29, 1989. Hayes sought relief for the convictions discussed above (CRF-87-2228) and (CRF-2463).[4] On December 6, 1989, the case was transferred to this Court. On May 30, 1991, Hayes filed a Motion For Bail Pendente Lite (docket #32).

Meanwhile -- while Hayes pursued his relief in federal court -- Penn appealed his case directly to the Oklahoma Court of Criminal Appeals. On June 27, 1991, the appellate court reversed and remanded Case No. CRF-87-2228 back to the trial court with instructions to dismiss. The appellate court did so, concluding that the June 9, 1989

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[2] *In this case, counts 1 through 11 were consolidated into a single count. Hayes has discharged his time on this count. The convictions pertinent to this case are counts 12 and 13 of CRF-2463 and CRF-2228.*

[3] *The appellate court informed Hayes that a habeas corpus "is not a substitute for a direct appeal." In addition, Hayes did not follow the court's suggestion in filing for post-conviction relief pursuant to 22 O.S.1981 §1080. As a result, he has not yet exhausted his state remedies.*

[4] *Hayes also sought relief for CRF-87-1981. However, Hayes discharged that sentence.*

search violated Penn's constitutional rights.[5] The Oklahoma Court of Criminal Appeals also reversed and remanded counts 12 and 13 in Case No. CRF-87-2463 on behalf of Penn.

Subsequently, the Magistrate Judge conducted a telephone hearing on January 30, 1992. In that hearing, Oklahoma Assistant Attorney General Steven Spears Kerr said he believed Hayes would be freed by the state because of the decisions regarding Penn by the Oklahoma Court of Criminal Appeals. However, on January 19, 1993, the state appellate court refused to grant Hayes an appeal out of time.

On April 8, 1993, another hearing was conducted before the Magistrate Judge. In that hearing, Mr. Kerr conceded that Hayes should be granted habeas relief. Furthermore, Mr. Kerr stated that his office would not object to such relief because he believes Hayes should be freed.

Hayes and Penn were convicted under the same set of facts for Counts 12 and 13 of CRF-2463 and CRF-2228. Penn's convictions have been reversed because police conducted an improper search. The key fact is that the record shows that Hayes was convicted due to the same illegal search by police, and the only reason Hayes convictions have not been reversed is because he failed to follow state procedure. Therefore, the convictions of Hayes -- like those of Penn's -- should be and are reversed.[6] This Court, therefore, grants Hayes habeas relief.

---

[5] *The state asserted the search was valid under the plain view doctrine. The Oklahoma Court of Criminal Appeals disagreed, concluding the officers exceeded the scope of the search warrant.*

[6] *Mr. Kerr, who represents the State, agrees with this conclusion.*

SO ORDERED THIS 14 day of April, 1993.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 4-16-93

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLARD E. DAVIS a/k/a WILLIARD E. DAVIS; KATHY A. DAVIS; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 92-C-674-E

FILED

APR 15 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DEFICIENCY JUDGMENT

This matter comes on for consideration this 15 day of April, 1993, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendants, Willard E. Davis a/k/a Williard E. Davis and Kathy A. Davis, appear neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that a copy of Plaintiff's Motion was mailed by first-class mail to Willard E. Davis a/k/a Williard E. Davis and Kathy A. Davis, 3148 South Cincinnati, Tulsa, Oklahoma 74101, and to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on September 8, 1992, in favor of the Plaintiff United States of America, and against the Defendants, Willard E. Davis

a/k/a Williard E. Davis and Kathy A. Davis, with interest and costs to date of sale is $95,694.15.

The Court further finds that the appraised value of the real property at the time of sale was $84,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered September 8, 1992, for the sum of $72,106.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on April 6, 1993.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendants, Willard E. Davis a/k/a Williard E. Davis and Kathy A. Davis, as follows:

Principal Balance plus pre-Judgment Interest as of 9-8-92	$93,045.07
Interest From Date of Judgment to Sale	1,034.63
Late Charges to Date of Judgment	446.32
Appraisal by Agency	500.00
Abstracting	300.00
Publication Fees of Notice of Sale	143.13
Court Appraisers' Fees	225.00
TOTAL	$95,694.15
Less Credit of Appraised Value -	84,000.00
DEFICIENCY	$11,694.15

plus interest on said deficiency judgment at the legal rate of _____ percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendants, Willard E. Davis a/k/a Williard E. Davis and Kathy A. Davis, a deficiency judgment in the amount of $11,694.15, plus interest at the legal rate of 3.67 percent per annum on said deficiency judgment from date of judgment until paid.

JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

KBA/esr

ENTERED ON DOCKET

DATE 4-16-93

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANNA M. HENRY a/k/a ANNA M. KAHLER; SPOUSE OF ANNA M. HENRY a/k/a ANNA M. KAHLER; COUNTY TREASURER, Washington County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma,

Defendants.

FILED

APR 15 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 93-C-0005-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of April, 1993. The Plaintiff appears by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, Anna M. Henry a/k/a Anna M. Kahler; Spouse of Anna M. Henry a/k/a Anna M. Kahler, who is one and the same person as Michael Leland Kahler, former spouse of Anna M. Henry a/k/a Anna M. Kahler; County Treasurer, Washington County, Oklahoma, and Board of County Commissioners, Washington County, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Anna M. Henry a/k/a Anna M. Kahler, acknowledged receipt of Summons and Complaint on January 10, 1993; that the Defendant, Spouse of Anna M. Henry a/k/a Anna M. Kahler, who is one and the same person as Michael Leland Kahler, former spouse of Anna M. Henry a/k/a Anna M.

Kahler, was served with Summons and Complaint on March 3, 1993; that Defendant, County Treasurer, Washington County, Oklahoma, acknowledged receipt of Summons and Complaint on January 19, 1993; and that Defendant, Board of County Commissioners, Washington County, Oklahoma, acknowledged receipt of Summons and Complaint on January 7, 1993.

It appears that the Defendants, Anna M. Henry a/k/a Anna M. Kahler; Spouse of Anna M. Henry a/k/a Anna M. Kahler, who is one and the same person as Michael Leland Kahler, former spouse of Anna M. Henry a/k/a Anna M. Kahler; County Treasurer, Washington County, Oklahoma, and Board of County Commissioners, Washington County, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Washington County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Twenty-Nine (29), Eastman Second Addition to Ochelata, Oklahoma.

The Court further finds that on August 26, 1985, Anna M. Henry executed and delivered to the United States of America, acting through the Farmers Home Administration, her promissory note in the amount of $33,000.00, payable in monthly installments, with interest thereon at the rate of 11 3/8 percent per annum.

The Court further finds that as security for the payment of the above-described note, Anna M. Henry executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated August 26, 1985, covering the above-described property. Said mortgage was recorded on August 26, 1985, in Book 835, Page 1240, in the records of Washington County, Oklahoma.

The Court further finds that on August 26, 1985, Anna M. Henry executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on May 19, 1986, Anna M. Henry, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on September 8, 1987, Anna M. Henry executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on July 7, 1988, Anna M. Henry, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on June 28, 1989, Anna M. Henry executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that the Defendant, Anna M. Henry a/k/a Anna M. Kahler, made default under the terms of the aforesaid note, mortgage, and interest credit agreements by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Anna M. Henry a/k/a Anna M. Kahler, is indebted to the Plaintiff in the principal sum of $32,941.53, plus accrued interest in the amount of $8,159.35 as of July 6, 1992, plus interest accruing thereafter at the rate of 11.375 percent per annum or $10.266 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of $8,641.75, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of $92.54 ($84.54 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, Anna M. Henry a/k/a Anna M. Kahler; Spouse of Anna M. Henry a/k/a Anna M. Kahler, who is one and the same person as Michael Leland Kahler, former spouse of Anna M. Henry a/k/a Anna M. Kahler; County Treasurer, Washington County, Oklahoma, and Board of County

Commissioners, Washington County, Oklahoma, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against Defendant, **Anna M. Henry a/k/a Anna M. Kahler**, in the principal sum of $32,941.53, plus accrued interest in the amount of $8,159.35 as of July 6, 1992, plus interest accruing thereafter at the rate of 11.375 percent per annum or $10.266 per day until judgment, plus interest thereafter at the current legal rate of 3.67 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of $8,641.75, plus interest on that sum at the current legal rate of 3.67 percent per annum from judgment until paid, plus the costs of this action in the amount of $92.54 ($84.54 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Anna M. Henry a/k/a Anna M. Kahler; Spouse of Anna M. Henry a/k/a Anna M. Kahler, who is one and the same person as Michael Leland Kahler, former spouse of Anna M. Henry a/k/a Anna M. Kahler; County Treasurer, Washington County, Oklahoma, and Board of County Commissioners, Washington County, Oklahoma County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Anna M. Henry a/k/a Anna M. Kahler**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

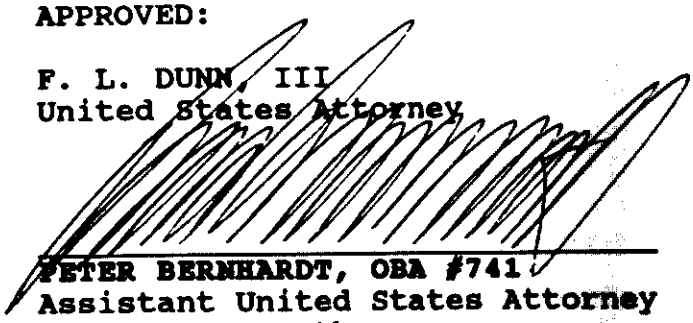
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

F. L. DUNN, III
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 93-C-0005-E

PB/css

ENTERED ON DOCKET

DATE 4-16-93

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SANDRA K. WILLIAMS nka SANDRA K. WINFIELD; PAUL WINFIELD; STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Rogers County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma,

Defendants.

FILED

APR 16 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 93-C-0077-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 16 day of April, 1993. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, appear by Bill M. Shaw, Assistant District Attorney, Rogers County, Oklahoma; and the Defendants, Sandra K. Williams n/k/a Sandra K. Winfield and Paul Winfield, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Sandra K. Williams n/k/a Sandra K. Winfield, acknowledged receipt of Summons and Complaint on February 20, 1993; that the Defendant, Paul Winfield, acknowledged receipt of Summons and Complaint on February 20, 1993; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax

Commission, acknowledged receipt of Summons and Complaint on February 1, 1993; and that Defendant, Board of County Commissioners, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on February 1, 1993.

It appears that the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, filed their Answer on February 5, 1993; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer, Counterclaim and Cross-Claim on February 19, 1993; and that the Defendants, Sandra K. Williams n/k/a Sandra K. Winfield and Paul Winfield, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

> LOT TWO (2), IN BLOCK ONE (1), OF MARTIN'S RANCH ACRES, AN ADDITION TO THE CITY OF INOLA, ROGERS COUNTY, OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on June 21, 1990, Gary W. Williams and Sandra K. Williams, executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, their mortgage note in the amount of $77,000.00, payable in monthly installments, with interest thereon at the rate of 7.5% percent (7.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Gary W. Williams and Sandra K. Williams, executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, a mortgage dated June 21, 1990, covering the above-described property. Said mortgage was recorded on June 22, 1990, in Book 833, Page 587, in the records of Rogers County, Oklahoma.

The Court further finds that on November 1, 1991, a Decree of Divorce was filed in District Court, Rogers County, State of Oklahoma, awarding Sandra K. Williams the above-described property as her sole and separate property free and clear of all claims, rights or interests whatsoever of Gary W. Williams.

The Court further finds that the Defendant, Sandra K. Williams n/k/a Sandra K. Winfield, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Sandra K. Williams n/k/a Sandra K. Winfield, is indebted to the Plaintiff in the principal sum of $76,104.35, plus interest at the rate of 7.5 percent per annum from November 1, 1991 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $8.00 for recording the Notice of Lis Pendens.

The Court further finds that the Defendant, County Treasurer, Rogers County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal

property taxes in the amount of $19.10 for the tax year 1992, with interest and costs. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Rogers County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, Sandra K. Williams n/k/a Sandra K. Winfield and Paul Winfield, are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action by virtue of Tax Warrant Number STS8700335701 against Sandra K. Williams, dated November 9, 1987 and filed on November 12, 1987 in the amount of $2,564.44, together with interest and penalty according to law, and costs. Said lien is inferior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Sandra K. Williams n/k/a Sandra K. Winfield, in the principal sum of $76,104.35, plus interest at the rate of 7.5 percent per annum from November 1, 1991 until judgment, plus interest thereafter at the current legal rate of 3.76 percent per annum until paid, plus the costs of this action in the amount of $8.00 for recording the Notice of Lis Pendens, plus any additional sums advanced or to be advanced or expended during this foreclosure

action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover judgment in the amount of $2,564.44, together with interest and penalty according to law, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Rogers County, Oklahoma, have and recover judgment in the amount of $19.10 for personal property taxes for the year 1992, with interest plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Sandra K. Williams n/k/a Sandra K. Winfield, Paul Winfield and Board of County Commissioners, Rogers County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Sandra K. Williams n/k/a Sandra K. Winfield, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, in the amount of $2,564.44, together with interest and penalty according to law, and costs.

Fourth:

In payment of Defendant, County Treasurer, Rogers County, Oklahoma, in the amount of $19.10 with interest and costs, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any

right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

KIM D. ASHLEY, OBA #14175
Assistant General Counsel for Defendant,
State of Oklahoma ex rel. Oklahoma Tax Commission

BILL M. SHAW, OBA #10127
Assistant District Attorney
Attorney for Defendant,
County Treasurer, Rogers County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-77-E

KBA/esr

ENTERED ON DOCKET

DATE 4-16-93

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARY LOU TEEMAN; COUNTY TREASURER, Osage County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma,

Defendants.

FILED

APR 16 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 92-C-535-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 16 day of April, 1993. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, appear by John S. Boggs, Jr., Assistant District Attorney, Osage County, Oklahoma; and the Defendant, Mary Lou Teeman, appears by her attorney Kenneth L. Spears.

The Court being fully advised and having examined the court file finds that the Defendant, Mary Lou Teeman, acknowledged receipt of Summons and Complaint on September 4, 1992; that Defendant, County Treasurer, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint on June 30, 1992; and that Defendant, Board of County Commissioners, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint on June 30, 1992.

It appears that the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, filed their Answer on July 1, 1992.

The Court further finds that this is a suit based upon certain promissory notes and for foreclosure of a mortgage securing said promissory notes upon the following described real property located in Osage County, Oklahoma, within the Northern Judicial District of Oklahoma:

> The S/2 of the SW/4 of Section 5, Township 23 North, Range 6 East, Osage County, Oklahoma.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Richard Leon Teeman and of judicially terminating the joint tenancy of Richard Leon Teeman and Mary Lou Teeman.

The Court further finds that Richard Leon Teeman became the record owner of the real property involved in this action by virtue of that certain Warranty Deed dated May 27, 1977, from Billie George Waters, joined by his wife, Ellen R. Waters, which Warranty Deed was filed of record on September 6, 1977, in Book 505, Page 194.

The Court further finds that Mary Lou Teeman and Richard Leon Teeman became the record owners of the real property involved in this action by virtue of that certain Warranty Deed dated November 29, 1978, from Mary Lou Teeman and Richard Leon Teeman, her husband, as joint tenants, and not as tenants in common, with full rights of survivorship, the whole estate to vest in the survivor in the event of the death of either, which

Warranty Deed was filed of record on November 29, 1978, in Book 549, Page 162, in the records of the County Clerk of Osage County, Oklahoma.

The Court further finds that on November 29, 1978, the Defendants, Richard Leon Teeman and Mary Lou Teeman, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of $120,000.00, payable in yearly installments, with interest thereon at the rate of 8.5 percent per annum.

The Court further finds that on November 29, 1978, the Defendants, Richard Leon Teeman and Mary Lou Teeman, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of $175,000.00, payable in yearly installments, with interest thereon at the rate of 8.5 percent per annum.

The Court further finds that as security for the payment of the above-described notes, the Defendants, Richard Leon Teeman and Mary Lou Teeman, executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated November 29, 1978, covering the above-described property, situated in the State of Oklahoma, Osage County. This mortgage was recorded on November 29, 1978, in Book 549, Page 138, in the records of Osage County, Oklahoma.

The Court further finds that on June 30, 1987, Richard Leon Teeman and Mary Lou Teeman filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court,

Western District of Oklahoma, Case No. 87-4873-B, and were subsequently discharged on October 27, 1987. On July 15, 1988, Case No. 87-4873-B, United States Bankruptcy Court for the Western District of Oklahoma, was closed.

The Court further finds that Richard Leon Teeman died on February 19, 1991, in Pawnee, Pawnee County, Oklahoma. Upon the death of Richard Leon Teeman, the subject property vested in his surviving joint tenant, Mary Lou Teeman, by operation of law. Certificate of Death No. 03948 issued by the Oklahoma State Department of Health certifies Richard Leon Teeman's death.

The Court further finds that the Defendant, Mary Lou Teeman, made default under the terms of the aforesaid notes and mortgage by reason of their failure to make the yearly installments due thereon, which default has continued, and that by reason thereof the Defendant, Mary Lou Teeman, is indebted to the Plaintiff in the principal sum of $280,066.40, plus accrued interest in the amount of $209,998.13 as of September 19, 1991, plus interest accruing thereafter at the rate of $65.2209 per day, until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $8.00 for recording Notice of Lis Pendens.

The Court further finds that Plaintiff is entitled to a judicial determination of the death of Richard Leon Teeman and to a judicial termination of the joint tenancy of Richard Leon Teeman and Mary Lou Teeman in the real property involved.

The Court further finds that the Defendant, County Treasurer and Board of County Commissioners, Osage County,

Oklahoma, have a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the total amount of $50.13, plus penalties and interest, for the year 1992. Said lien is superior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the death of Richard Leon Teeman be and the same is judicially determined to have occurred on February 19, 1991, in the City of Pawnee, Pawnee County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint tenancy of Richard Leon Teeman and Mary Lou Teeman in the above-described real property be and the same is judicially terminated as of the date of the death of Richard Leon Teeman on February 19, 1991.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against Defendant, **Mary Lou Teeman**, in the principal sum of $280,066.40, plus accrued interest in the amount of $209,998.13 as of September 19, 1991, plus interest accruing thereafter at the rate of $65.2209 per day, until judgment, plus interest thereafter at the current legal rate of 3.76 percent per annum until paid, plus the costs of this action in the amount of $8.00 for recording Notice of Lis Pendens, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have and recover judgment in the amount of $50.13, plus penalties and interest, for ad valorem taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Mary Lou Teeman**, to satisfy the **in rem** judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, in the total amount of $50.13, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN THOMAS MCLAUGHLIN, III, et al,)
)
Plaintiffs,)
)
v.) 92-C-363-B
)
STANLEY GLANZ, et al,)
)
Defendants.)

ORDER

Now before this Court are two motions by the Defendants: A Motion To Dismiss And Alternative Motion For Summary Judgment by Defendant Donald E. Crowl *(docket #10)* and a Motion For Summary Judgment *(docket #16)* by Defendant Stanley Glanz. The motions are brought in response to a lawsuit filed by Plaintiff John Thomas McLaughlin. McLaughlin alleges that Crowl and Glanz violated six constitutional rights while he was a prisoner at the Tulsa City County Jail.

I. Procedural History

On March 20, 1992, the United States Marshal brought Plaintiff John Thomas McLaughlin to Tulsa on a federal Writ of Habeas Corpus Ad Prosequendum. McLaughlin was brought to Tulsa to stand trial on a charge of False Statement of Purchase of Firearms and Possession of a Firearm, AFCF. The Marshal's Office then placed McLaughlin in the Tulsa City-County Jail.[1]

[1] *The Marshal's Office has an agreement with Tulsa City-County Jail officials to house federal prisoners. As a part of this agreement, the Marshal's Office pays the Jail a daily fee to keep its prisoners. Although the issue will be not be addressed here, it appears that the two parties have disagreements as to the interpretation of the agreement.*

34

Defendants concede that in March of 1992 and during McLaughlin's stay, the jail population swelled. *See, Addendum To Special Report (docket #26).* Defendants also admit that overcrowding in certain jell cells took place during McLaughlin's four-month stay. McLaughlin was returned to the custody of the United States Marshal in July of 1992. He now resides in the federal correctional facility in El Reno.

While at the Jail, McLaughlin, on May 1, 1992, filed the instant lawsuit under 42 U.S.C. §1983. He asserts the following claims: 1) Defendants violated his Eighth Amendment rights by denying him outdoor recreation activities; 2) Defendants violated his Sixth Amendment access to court rights by not allowing "hands-on" use of legal materials; 3) Defendants violated his First Amendment rights by denying him reading material; 4) Defendants violated his First Amendment rights by curtailing his visitation privileges; 5) Defendants violated his Eighth Amendment rights by denying him "adequate and necessary sanitation concerns"; and 6) Defendants violated his constitutional rights by "arbitrarily and capriciously" denying him television and board game privileges." *Civil Rights Complaint (docket #2).*[2]

Following McLaughlin's Complaint, Crowl filed a Motion For Summary Judgment on July 24, 1992. Glanz then filed a Motion For Summary Judgment on August 17, 1992.[3]

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[2] *McLaughlin's request for injunctive relief is moot since he is no longer in the Tulsa City-County Jail.*

[3] *Under Local Rule 15, memoranda in opposition to summary judgment motions must be filed within 15 days. McLaughlin filed an Opposition Memorandum (docket #29) on March 1, 1993 --nearly eight months after Crowl's Motion For Summary Judgment. On March 1, 1993, McLaughlin also filed a Notice of Plaintiff's Inability To Affirmatively Respond To State Defendant's Motion For Summary Judgment (docket #28), which was more than seven months after Glanz filed his summary judgment motion. Given the inordinate amount of time McLaughlin has had to respond, he will not be allowed to further supplement the record.*

II. Legal Analysis

In order to establish a claim under 42 U.S.C. §1983, a plaintiff must present evidence that Defendants have deprived him of a federally protected right and the person who deprived him of that right acted under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572, 577 (1980).

The issue here is whether summary judgment is proper under Fed.R.Civ.P. 56. Rule 56 states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[4]

Under Rule 56, the moving party must first inform the court of the basis for the motion. It then must identify those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Once the moving party meets its initial burden, the non-moving party must set forth evidence, raising genuine issues of material fact per Rule 56(c). The non-moving party also receives an advantage as a court must accept as true the non-moving party's evidence and must draw all legitimate inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

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[4] *McLaughlin is proceeding pro se. Pro se pleadings are to be liberally construed. Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). As a result, pro se motions and complaints are held to less stringent requirements.*

However, Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party who bears the burden of proof at trial if it "fails to make a showing sufficient to establish the existence of an element essential to that party's case. *A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff."* *Id. at 2512.* Rule 56(e) also states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.[5]

In *Hall v. Bellmon*, the Tenth Circuit outlined the procedure to handle summary judgment motions when *pro se* litigants were involved.[6] Material factual disputes cannot be resolved at summary judgment based on conflicting affidavits. However, the court also noted that "affidavits or other evidence offered by a nonmovant must create a genuine issue for trial...it is not enough that the evidence be merely colorable or anything short of

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[5] *In addition to his Complaint, McLaughlin has submitted three affidavits in his opposition to Defendants' summary judgment motions. One of the affidavits by Peter McMahon indicates that McMahon talked to the United States Marshal's Office about the jail conditions. The affidavit of Michael Youngpeter also discusses the jail conditions and indicates that he had conversations with Marshal's Office about the jail conditions. McLaughlin also offers his own affidavit, which states, in part: "During the time I was in cell TPD #29, I personally saw and spoke with Mr. Fagala...on at least one occasion...I also complained to Mr. Fagala about a significant medical problem of mine which was being ignored by Jail officials, yet needed treatment. The problem concerned a condition of gout in both of my legs. The Jail's doctor told me that because my condition existed previous to my coming to the facility, I would not receive treatment...I was later assigned to a cell referred to as A Tank on the Eighth floor of the County building. I persisted in my efforts to obtain medical assistance, and I became aware that other federal detainees were experience the same problems because medical assistance was not being provided. I was finally taken to an outside doctor by Deputy U.S. Marshals." In his affidavit, McLaughlin makes no mention of his claims concerning visitation, access to courts, censorship of mail and denial of television/game board privileges. He does discuss the overcrowding, but does not specifically address his allegations concerning outdoor recreation and sanitary concerns.*

[6] *935 F.2d 1106, 1110 (10th Cir.1991).*

"significantly probative." *Id. at 1111.*[7]

A. Outdoor Recreation

Glanz admits that McLaughlin, because he was considered to be a "high escape risk" under Jail policy, received no outdoor recreation during his stay at the Jail. McLaughlin, however, argues that he is entitled to a minimum of five hours of weekly outdoor recreation.

Lack of exercise may certainly rise to a constitutional violation. *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985). But McLaughlin has not shown a genuine issue exists in this case. First, McLaughlin does not dispute he was able to do some exercise in his cell. Second, jail officials may deny outdoor privileges for security reasons. *See, Martin v. Tyson*, 845 F.2d 1451, 1456 (7th Cir. 1988).

B. Denial of Access to the Courts

McLaughlin asserts in his Complaint that he was denied both "hands-on" use of any legal materials and any other type of legal assistance. The Special Report states that, under jail policy, inmates judged to be escape risks are not eligible to personally visit a law library. As a result, the report shows that McLaughlin was not allowed hands-on use of legal materials. The Special Report also indicates that McLaughlin "never requested copies of any legal materials" during his stay at the Jail.

Since McLaughlin has the burden to prove his §1983 claim, he must present evidence on which the jury could reasonably find a §1983 violation. He has not done so. He has not pointed to any evidence that shows he was denied access to adequate legal

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[7] *Defendants' Special Report is to be treated like an affidavit. The Plaintiff's Complaint is also to be treated like an affidavit. Hall, 935 F.2d at 1111.*

assistance to help him prepare and pursue his claims before the courts or that Defendants in any significant way restricted that access. *See, Love v. Summit County*, 776 F.2d 908 (10th Cir. 1985).[8]

C. Allegation of Mail Censorship

Mail sent to a prisoner may be screened or censored pursuant to regulations and practices "reasonably related to penological interests." *Martucci v. Johnson*, 944 F.2d 291, 295 (6th Cir. 1991). In this case, Jail policy allows an inmate to receive an unlimited amount of mail except "when there is convincing evidence to justify restriction." According to the Special Report, restriction usually takes place for safety and security concerns.

In this case, McLaughlin claims that Jail officials prohibited him from receiving mail, but he cites no specific instance. Furthermore, the Special Report indicates that McLaughlin never told them of being denied mail. Again, the burden is on McLaughlin to come forward with evidence beyond the pleadings supporting his claim. He has not done so, and, as a result, summary judgment is granted in favor of Defendants on this issue.

D. Visitation

A convicted prisoner has no absolute constitutional right to visitation. Such a privilege is subject to the discretion of prison authorities, provided the visitation policies of the prison meet legitimate penological objectives. *Evans v. Johnson*, 808 F.2d 1427, 1428 (11th Cir. 1987).

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[8] *The inquiry on this issue is "whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Bounds v. Smith, 430 U.S. 817, 825, 97 S.Ct. 1491, 1496, 52 L.Ed.2d 72 (1977). According to McLaughlin, he was able to talk to his attorney while being detained at the Jail. See McLaughlin Affidavit.*

McLaughlin presents no evidence of any specific denial of visitation rights.[9] He, in essence, simply complains that he, and other inmates, are being "arbitrarily [sic] and capriciously denied visitation opportunities...by [Defendants'] failure to provide adequate facilities." He does not say how he was harmed by such a policy or that he was even affected by it.[10]

E. Sanitation Concerns

In analyzing Eighth Amendment claims, courts must examine the discrete areas of basic human needs. An institution's obligation under the Eighth Amendment "is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety." *Hoptowit v. Ray,* 682 F.2d 1237, 1246 (9th Cir. 1982), *quoting Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978).* A §1983 violation does not arise when prisoners are merely inconvenienced or suffer de minimus injuries. *Hernandez v. Denton,* 861 F.2d 1421, 1424 (9th Cir. 1988).

McLaughlin claims in his Complaint that he has been denied "the right to receive, at regular intervals, clean bedding material, towels, razors, and the like."[11] He also asserts that, due to the Jail's overcrowding, there are inadequate shower and toilet facilities. However, he fails to be specific. In essence, he has offered only general

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[9] *The Special Report states that records show that McLaughlin did not have a visitor while staying at the Jail. McLaughlin does not dispute that.*

[10] *Jail policy allows each inmate up to three visitors per week. Each visitor is allowed 20 minutes, although no physical contact is permitted. Instead, inmates are escorted to an individual cell and speak with visitors via a telephone.*

[11] *McLaughlin does not specifically mention this in his Affidavit or any other evidence he presented.*

allegations.[12]

F. Television and Board Game Privileges

McLaughlin's sixth claim states that he was denied privileges afforded other Jail inmates. The Report states that McLaughlin did not receive television and board game privileges because he was considered a high security risk. Such discretion by prison officials for security reasons is not a constitutional violation. Therefore, McLaughlin has not shown how such a denial rises to the level of a §1983 violation.

III. Conclusion

McLaughlin asserts six claims that he believes constitute a §1983 violation. However, McLaughlin, as the non-moving party, has the burden to present evidence on which a jury could reasonably find for the plaintiff." He has not done so. The three affidavits, submitted in addition to the general allegations in the Complaint are insufficient to raise a genuine issue of material fact for trial. Therefore, Defendants' Motion For Summary Judgment (docket #s 10 and 16) are GRANTED.

SO ORDERED THIS 15 day of Apr, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[12] *The Special Report states that McLaughlin has "routinely been provided with clean laundry, which includes bedding material, towels and clean clothes." The Report also states that inmates such as McLaughlin can "obtain razors and other commissary health items for personal hygiene simply by requesting the same."*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN THOMAS MCLAUGHLIN, III, Plaintiff,	)	
vs.	)	No. 92-C-363-B
STANLEY GLANZ, et al., Defendants.	)	

J U D G M E N T

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Stanley Glanz and Donald E. Crowl, and against the Plaintiff, John Thomas McLaughlin, III. Plaintiff shall take nothing of his claim. Each party shall pay his own costs.

Dated, this 15th day of April, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

37

ENTERED ON DOCKET

DATE 4-16-93

FILED

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SANDRA J. SODERQUIST, Plaintiff,	)	
vs.	)	Case No. 92-C-1008-E
INOLA CASTING WORKS and GEORGE FREEMAN, Defendant.	)	

STIPULATION OF DISMISSAL

Plaintiff and Defendants state:

Although this matter is at issue and through no fault of the Defendants or their counsel, the discovery to be conducted in this matter has been delayed for an indeterminate period of time.

In the interests of justice and by agreement of the parties, this matter is stipulated and agreed to be dismissed without prejudice to refiling within the period prescribed by statute.

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ENTERED ON DOCKET

DATE 4-16-93

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLTON D. MEREDITH a/k/a CHARLTON DALE MEREDITH; KATHERINE M. MEREDITH a/k/a KATHERINE MAURINE MEREDITH; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

APR 15 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 93-C-0053-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of April, 1993. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, appear not, having previously disclaimed any right, title or interest in the subject property; and the Defendants, Charlton D. Meredith a/k/a Charlton Dale Meredith and Katherine M. Meredith a/k/a Katherine Maurine Meredith, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Charlton D. Meredith a/k/a Charlton Dale Meredith, was served with Summons and Complaint on March 11, 1993; that the Defendant, Katherine M. Meredith a/k/a Katherine Maurine Meredith, acknowledged receipt of Summons and Complaint on February 17, 1993; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and

Complaint on January 28, 1993; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 25, 1993.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on February 23, 1993; and that the Defendants, Charlton D. Meredith a/k/a Charlton Dale Meredith and Katherine M. Meredith a/k/a Katherine Maurine Meredith, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on October 18, 1991, Charlton Dale Meredith and Katherine Maurine Meredith filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-03676-C, were discharged on February 10, 1992, and the case was closed on March 25, 1992.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Twenty-four (24), Block Nine (9), SOUTHERN MEMORIAL ACRES EXTENDED, an Addition to the City of Bixby, Tulsa County, State of Oklahoma, according to the recorded Plat No. 2600.

The Court further finds that on February 13, 1987, the Defendants, Charlton D. Meredith and Katherine M. Meredith, executed and delivered to Sears Mortgage Corporation, their

mortgage note in the amount of $64,600.00, payable in monthly installments, with interest thereon at the rate of 8.5 percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Charlton D. Meredith and Katherine M. Meredith, executed and delivered to Sears Mortgage Corporation, a mortgage dated February 13, 1987, covering the above-described property. Said mortgage was recorded on February 17, 1987, in Book 5002, Page 534, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 30, 1987, Sears Mortgage Corporation assigned the above-described mortgage to Independence One Mortgage Corporation. This Assignment was recorded in Book 5228, Page 130 in the records of Tulsa County, Oklahoma. On June 30, 1988, Sears Mortgage Corporation executed a corrected Assignment to Independence One Mortgage Corporation which was recorded in Book 5377, Page 0847 in the records of Tulsa County, Oklahoma.

The Court further finds that on February 12, 1991, Independence One Mortgage Corporation assigned the above-described mortgage to the Secretary of Veterans Affairs. This Assignment was recorded in Book 5306, Page 329, in the records of Tulsa County, Oklahoma. On September 18, 1992, Independence One Mortgage Corporation executed a corrected Assignment to the Secretary of Veterans Affairs which was recorded in Book 5439, Page 1055, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Charlton D. Meredith a/k/a Charlton Dale Meredith and Katherine M. Meredith a/k/a Katherine Maurine Meredith, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Charlton D. Meredith a/k/a Charlton Dale Meredith and Katherine M. Meredith a/k/a Katherine Maurine Meredith, are indebted to the Plaintiff in the principal sum of $68,676.35, plus interest at the rate of 8.5 percent per annum from June 1, 1991 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $8.76 for service of Summons and Complaint.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, Charlton D. Meredith a/k/a Charlton Dale Meredith and Katherine M. Meredith a/k/a Katherine Maurine Meredith, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendants, Charlton D. Meredith a/k/a Charlton Dale Meredith and Katherine M. Meredith a/k/a Katherine Maurine Meredith, in the principal sum of $68,676.35, plus interest at the rate of 8.5 percent per annum from June 1, 1991 until judgment, plus interest

thereafter at the current legal rate of 3.67 percent per annum until paid, plus the costs of this action in the amount of $8.76 for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Charlton D. Meredith a/k/a Charlton Dale Meredith, Katherine M. Meredith a/k/a Katherine Maurine Meredith, and the County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Charlton D. Meredith a/k/a Charlton Dale Meredith and Katherine M. Meredith a/k/a Katherine Maurine Meredith, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:

F.L. DUNN, III
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 93-C-0053-E
PP/esr

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

STANLEY McNUTT, TRACY McNUTT, CATHERINE McNUTT, and TODD McNUTT,

Plaintiffs,

v.

NO. CIV-92-C-510-B

WARNER BROS. DISTRIBUTING CORPORATION, a New York corporation, SAMMY HAGAR, individually and doing business as VAN HALEN, EDWARD VAN HALEN, individually and doing business as VAN HALEN, MICHAEL ANTHONY, individually and doing business as VAN HALEN, ALEX VAN HALEN, individually and doing business as VAN HALEN, ANDY JOHNS, an individual, TED TEMPLEMAN, an individual.

Defendants.

ORDER FOR DISMISSAL WITH PREJUDICE

NOW on this 13 day of April, 1993, and upon the Application of the parties, the court hereby dismisses with prejudice all claims the plaintiffs, STANLEY McNUTT, TRACY McNUTT, CATHERINE McNUTT, and TODD McNUTT, may have against the defendants, WARNER BROS. DISTRIBUTING CORPORATION, SAMMY HAGAR, individually and d/b/a VAN HALEN, EDWARD VAN HALEN, individually and d/b/a VAN HALEN, MICHAEL ANTHONY, individually and d/b/a VAN HALEN, ALEX VAN HALEN, individually and d/b/a VAN HALEN, ANDY JOHNS, an individual, and TED TEMPLEMAN, an individual for any and all damages arising heretofore or hereafter out of the incident described in the plaintiff's Complaint.

DATED this 13 day of April, 1993.

S/ THOMAS R. BRETT

JUDGE OF THE U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DORIS D. BLOCK; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 91-C-105-B

DEFICIENCY JUDGMENT

This matter comes on for consideration this 13th day of April, 1993, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, Doris D. Block, appears neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that a copy of Plaintiff's Motion was mailed by first-class mail to Steven W. Vincent, Attorney for Defendant, Doris D. Block, 616 S. Main, Suite 308, Tulsa, Oklahoma 74119, and to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on May 4, 1992, in favor of the Plaintiff United States of America, and against the Defendant, Doris D. Block, with interest and costs to date of sale is $23,990.77.

The Court further finds that the appraised value of the real property at the time of sale was $5,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered May 4, 1992, for the sum of $4,989.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on April 5, 1993.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Doris D. Block, as follows:

Principal Balance plus pre-Judgment Interest as of 5-4-92		$22,087.68
Interest From Date of Judgment to Sale		653.22
Late Charges to Date of Judgment		312.20
Appraisal by Agency		300.00
Abstracting		280.50
Publication Fees of Notice of Sale		132.17
Court Appraisers' Fees		225.00
TOTAL	$	23,990.77
Less Credit of Appraised Value	-	5,000.00
DEFICIENCY	$	18,990.77

plus interest on said deficiency judgment at the legal rate of 3.37 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of

Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, Doris D. Block, a deficiency judgment in the amount of $18,990.77, plus interest at the legal rate of 3.37 percent per annum on said deficiency judgment from date of judgment until paid.

S/ H. DEAN R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PB/esr

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation,

Plaintiff,

vs.

BROWN FLIGHT RENTAL ONE CORP., a foreign corporation; and RICHARD BROWN, an individual,

Defendants/Counterclaimants,

vs.

PENTASTAR SERVICES, INC., THOMAS BONNER, SCOTT ANDERSON, FRED CHESEBRO and TOD HAMILTON,

Additional Defendants on Counterclaims.

Case No. 91-C-993-B
Case No. 92-C-245-B
(Consolidated Cases)

STIPULATED ORDER AND JUDGMENT REGARDING COSTS AND ATTORNEYS' FEES

WHEREAS the parties to the above-captioned litigation stipulate and agree to the findings and terms of this order and judgment, the Court finds and orders as follows:

1. Thrifty Rent-A-Car System, Inc. ("Thrifty"), Pentastar Services, Inc., Thomas Bonner, Scott Anderson, Fred Chesebro and Tod Hamilton (collectively "Thrifty parties") were the prevailing parties on the counterclaims of Brown Flight Rental One Corp. ("Brown Flight") and Richard Brown (collectively "the Browns"). Thrifty was the prevailing party on Thrifty's breach of contract claims against the Browns and on Thrifty's conversion claim against Brown Flight. Thrifty bore all costs and attorneys' fees incurred by the Thrifty parties in this case and, consequently, is the only

one of the Thrifty parties entitled to costs or attorneys' fees as a prevailing party.

2. Richard Brown was the prevailing party on Thrifty's conversion claim against him.

3. Pursuant to Fed.R.Civ.P. 54(d) and Local Rule 6, Thrifty should be awarded costs and attorneys' fees, as prevailing party, in the total amount of $400,000.00. Said amount was determined by agreement of the parties, after giving Richard Brown credit, as prevailing party on Thrifty's conversion claim, for a proportionate amount of the costs incurred by him.

4. By stipulating to this order and judgment, the parties do not stipulate to the correctness of any finding, ruling, order or judgment by this Court nor do they waive their right to seek appellate review of any finding, ruling, order or judgment.

WHEREFORE, it is ordered, adjudged and decreed that judgment be entered in favor of Thrifty Rent-A-Car Systems, Inc. and against Brown Flight Rental One Corp. and Richard Brown in the amount of $400,000.00 for costs and attorneys' fees.

DATED this 13th day of April, 1993.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

STIPULATED ORDER AND JUDGMENT REGARDING COSTS AND ATTORNEYS' FEES

STIPULATED AND AGREED TO:

James L. Kincaid
W. Kyle Tresch
CROWE & DUNLEVY
500 Kennedy Building
321 S. Boston Avenue
Tulsa, OK 74103-3313
(918) 592-9800
ATTORNEYS FOR THRIFTY RENT-A-CAR SYSTEMS, INC., PENTASTAR SERVICES, INC., THOMAS BONNER, SCOTT ANDERSON, FRED CHESEBRO and TOD HAMILTON

Drew Neville
Russell Cook
LINN & HELMS
201 Robert S. Kerr Avenue
1200 Bank of Oklahoma Plaza
Oklahoma City, Oklahoma 73102
(405) 239-6781
ATTORNEYS FOR BROWN FLIGHT RENTAL ONE CORP. and RICHARD BROWN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JONNIE C. BOWEN,

Plaintiff,

v.

L.B. SMITH, INC.,

Defendant.

CASE NO. 92-C-706B

ADMINISTRATIVE CLOSURE ORDER

Upon joint motion of the parties and for good cause therein shown, it is hereby Ordered as follows:

A. This action is continued under administrative closure for sixty (60) days from the date of the filing of this Order, without prejudice to the parties' respective rights to reopen this action on or before that time, if further litigation becomes necessary;

B. If no motion to reopen or motion to extend the administrative closure is filed on or before the expiration of the 60th day, then the parties' claims, if any, against each other herein are hereby dismissed with prejudice, with each party to bear their own attorney's fees, costs and expenses.

Dated this 13 day of April, 1993.

United States District Judge
Northern District of Oklahoma

DATE APR 19 1993

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LAHOMA J. KUYKENDALL; AMOS BURRIS, Tenant; AMY BURRIS, Tenant; LARRY FUGATE, Tenant; JANET DAVIS FUGATE, Tenant; TOMMY BARGES, Tenant; PHYLLIS BARGES, Tenant; COUNTY TREASURER, Washington County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma,

Defendants.

FILED

APR 19 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 92-C-804-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 13 day of April, 1993. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, Lahoma J. Kuykendall; Amos Burris, Tenant; Amy Burris, Tenant; Larry Fugate, Tenant; Janet Davis Fugate, Tenant; County Treasurer, Washington County, Oklahoma; and Board of County Commissioners, Washington County, appear not, but make default; and the Defendants, Tommy Barges, Tenant and Phyllis Barges, Tenant, appear not, and should be dismissed from this action.

The Court being fully advised and having examined the court file finds that the Defendant, Lahoma J. Kuykendall, acknowledged receipt of Summons and Complaint on September 15, 1992, through her power of attorney Lynne Downing; that the

Defendant, Amos Burris, Tenant, acknowledged receipt of Summons and Complaint on September 29, 1992; that the Defendant, Amy Burris, Tenant, acknowledged receipt of Summons and Complaint on September 28, 1992; that the Defendant, Larry Fugate, Tenant, acknowledged receipt of Summons and Complaint on September 23, 1992; that the Defendant, Janet Davis Fugate, Tenant, acknowledged receipt of Summons and Complaint on September 24, 1992; that the Defendant, County Treasurer, Washington County, Oklahoma, acknowledged receipt of Summons and Complaint on September 24, 1992; and that the Defendant, Board of County Commissioners, Washington County, acknowledged receipt of Summons and Complaint on December 2, 1992.

The Court further finds that the Defendants, Tommy Barges, Tenant and Phyllis Barges, Tenant, have not been served as such persons do not occupy a dwelling on the subject real property, and should therefore be dismissed as Defendants.

It appears that the Defendants, Lahoma J. Kuykendall; Amos Burris, Tenant; Amy Burris, Tenant; Larry Fugate, Tenant; Janet Davis Fugate, Tenant; County Treasurer, Washington County, Oklahoma; and Board of County Commissioners, Washington County, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon promissory notes and for foreclosure of a mortgage securing said promissory notes upon the following described real property located in Washington County, Oklahoma, within the Northern Judicial District of Oklahoma:

The North Half (N/2) of the North Half (N/2) of Lot Five (5) and the Northwest Quarter of the Northwest Quarter of the Southeast Quarter (NW/4 NW/4 SE/4) of Section 2, Township Twenty-Six (26) North, Range Twelve (12) East, all in Washington County, Oklahoma.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Dale Wesley Kuykendall a/k/a Dale W. Kuykendall (hereinafter referred to by either of these names) and of judicially terminating the joint tenancy of Dale W. Kuykendall and Lahoma J. Kuykendall in the subject real property.

The Court further finds that Dale W. Kuykendall and Lahoma J. Kuykendall, husband and wife, became the record owners of the real property involved in this action by virtue of that certain General Warranty Deed dated September 1, 1977, from Austin L. Shores and Beulah Mae Shores, husband and wife, to Dale W. Kuykendall and Lahoma J. Kuykendall, husband and wife, as joint tenants, and not as tenants in common, with the fee simple title in the survivor, the heirs and assigns of the survivor, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining forever, which General Warranty Deed was filed of record on August 19, 1980, in Book 743, Page 360, in the records of the County Clerk of Washington County, Oklahoma.

The Court further finds that on January 2, 1987, Dale W. Kuykendall and Lahoma J. Kuykendall executed and delivered to the United States of America, acting on behalf of the Small Business Administration, their promissory notes in the

amount of $118,300.00 and $76,300.00, payable in monthly installments, with interest thereon at the rate of 4 percent per annum.

The Court further finds that as security for the payment of the above-described notes, Dale W. Kuykendall and Lahoma J. Kuykendall executed and delivered to the United States of America, acting on behalf of the Small Business Administration, a real estate mortgage dated January 2, 1987, covering the above-described property, situated in the State of Oklahoma, Washington County. This mortgage was recorded on February 18, 1987, in Book 812, Page 1616, in the records of Washington County, Oklahoma.

The Court further finds that Dale Wesley Kuykendall died on July 24, 1989. Upon the death of Dale Wesley Kuykendall a/k/a Dale W. Kuykendall, the subject property vested in his surviving joint tenant, Lahoma J. Kuykendall, by operation of law. A copy of a Certificate of Death issued by the Oklahoma State Department of Health certifying Dale Wesley Kuykendall's death was attached as Exhibit "D" and incorporated in the Complaint filed in this case.

The Court further finds that the Defendant, Lahoma J. Kuykendall, made default under the terms of the aforesaid notes and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Lahoma J. Kuykendall, is indebted to the Plaintiff in the principal sum of $158,575.76,

together with accrued interest of $14,620.35 as of February 10, 1992, with interest thereafter at the rate of 4 percent per annum or $17.37 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $8.00 for recording Notice of Lis Pendens.

The Court further finds that the Plaintiff is entitled to a judicial determination of the death of Dale Wesley Kuykendall, and to a judicial termination of the joint tenancy of Dale W. Kuykendall and Lahoma J. Kuykendall in the real property involved.

The Court further finds that the Defendants, Lahoma J. Kuykendall; Amos Burris, Tenant; Amy Burris, Tenant; Larry Fugate, Tenant; Janet Davis Fugate, Tenant; County Treasurer, Washington County, Oklahoma; and Board of County Commissioners, Washington County, are in default and therefore have no right, title, or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the death of Dale Wesley Kuykendall a/k/a Dale W. Kuykendall occurred on July 24, 1989, in the City of Bartlesville, Washington County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint tenancy of Dale Wesley Kuykendall a/k/a Dale W. Kuykendall and Lahoma J. Kuykendall in the above-described real property be and the same is judicially terminated as of the date of the death of Dale Wesley Kuykendall on July 24, 1989.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against Defendant, Lahoma J.

Kuykendall, in the principal sum of $158,575.76, together with accrued interest of $14,620.35 as of February 10, 1992, with interest thereafter at the rate of 4 percent per annum or $17.37 per day until judgment, plus interest thereafter at the current legal rate of 3.37 percent per annum until paid, plus the costs of this action in the amount of $8.00 for recording Notice of Lis Pendens, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Lahoma J. Kuykendall; Amos Burris, Tenant; Amy Burris, Tenant; Larry Fugate, Tenant; Janet Davis Fugate, Tenant; Tommy Barges, Tenant; Phyllis Barges, Tenant; County Treasurer, Washington County, Oklahoma; and Board of County Commissioners, Washington County, have no right, title, or interest in the subject real property, and the Defendants, Tommy Barges, Tenant and Phyllis Barges, Tenant, are dismissed as Defendants herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Lahoma J. Kuykendall, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 92-C-804-B

ENTERED ON DOCKET

DATE 4-15-93

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. **FOUR HUNDRED FIFTY THOUSAND FOUR HUNDRED FORTY-FIVE AND 91/100 DOLLARS ($450,445.91) IN UNITED STATES CURRENCY,** and **THIRTEEN ITEMS OF JEWELRY,** Defendants.	**CIVIL ACTION NO. 91-C-0091-E**

FILED

APR 14 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the Plaintiff's Application for Judgment of Forfeiture by Default Against Defendant Currency As To Certain Individuals/Entities and for Judgment of Forfeiture By Stipulation as to Other Individuals/Entities, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 12th day of February 1991, alleging that the defendant currency and jewelry were subject to forfeiture pursuant to Title 18 § 981, because they were involved in a transaction or attempted transaction in violation of 18 U.S.C. §§ 1956 and 1957 and/or pursuant to 18 U.S.C. § 1955, because they were used in violation of the provisions of 18 U.S.C. § 1955.

A Warrant of Arrest and Notice In Rem was issued on the 19th day of December 1991, by the Clerk of the District Court for the Northern District of Oklahoma, as to the defendant currency

and jewelry, pursuant to Order for Warrant of Arrest and Notice In Rem issued by United States District Judge James O. Ellison on the 18th day of December, 1991, and filed on December 19, 1991.

The United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Order, and the Warrant of Arrest and Notice In Rem on the defendant currency and jewelry on January 13, 1992.

On March 4, 1991, Arnold D. Burleson filed a Petition for Remission or Mitigation of Forfeiture in this case. This Petition was incomplete and failed to meet the requirements of 28 C.F.R. § 9.3 and was returned to Mr. Burleson's attorney by Assistant United States Attorney Catherine J. Depew. Subsequently, Claimant's counsel acknowledged that the Petition should not have been filed in the case, but instead should have been filed with the U. S. Attorney's Office.

Thereafter, the Office of the United States Attorney for the Northern District of Oklahoma received on March 21, 1991, from Arnold Burleson, individually and as officer and director of KBC Holding, Inc., an Oklahoma Corporation, a qualified Petition for Remission or Mitigation of Forfeiture. On April 5, 1991, Arnold Burleson and Katherine M. Burleson, filed their Petitions in Bankruptcy in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 91-01136-W. On April 9, 1991, pursuant to leave of Court, George B. Reinke, a judgment creditor of Arnold and Katherine Burleson in Case No. CJ-85-2614

in the District Court of Tulsa County, Oklahoma, in the principal amount of $40,913.56, plus interest, filed a Claim to Forfeiture Property. In his claim, Mr. Reinke specifically acknowledged that his interest was inferior to that of the United States, and that only if the defendant currency should not be forfeited would Mr. Reinke be entitled to assert his claim against the currency.

On December 3, 1991, Lonnie D. Eck, the Trustee in the above-referenced bankruptcy, through special counsel, filed a motion herein for substitution of parties. Thereafter, on December 19, 1991, this Court entered an Order herein granting the Motion for Substitution of Parties, whereby Lonnie D. Eck, Trustee in Bankruptcy of Arnold D. and Katherine M. Burleson, in Case No. 91-01136-W, was substituted as party Claimant for Arnold Burleson with regard to his Petition in remission and George B. Reinke with regard to his claim. On November 25, 1991, the Asset Forfeiture Office of the Department of Justice denied the Petition for Remission or Mitigation of Forfeiture filed by Arnold D. Burleson. The denial of the Petition for Remission or Mitigation by the Department of Justice, and the Order of this Court filed herein on March 31, 1993, declaring the issues raised in Claimant Burleson's Petition for Remission or Mitigation of Forfeiture as moot and denying Claimant's Petition, effectively removes Lonnie D. Eck, the Bankruptcy Trustee, as a potential claimant herein. Neither Arnold nor Katherine Burleson filed a claim or any other request for relief, except for Arnold Burleson's Petition for Remission. Failure to file a claim at

the same time as the Petition in remission waived their right, and the right of a substituted party, to contest the forfeiture judicially. Reinke's claim for which the Trustee was substituted as a party for Reinke, specifically acknowledged that the interest of Reinke was inferior to that of the government as to the defendant currency.

The following individuals and entities were determined to be potential claimants in this action with possible standing to file a claim:

ARNOLD D. BURLESON

KATHERINE M. BURLESON, a/k/a KATHY BURLESON

KRISTI BURLESON

JACQUELINE MELISSA FISHER a/k/a JACKIE FISHER

ARKANSAS INSTITUTE FOR SOCIAL JUSTICE

HANDICAPS UNLIMITED OF OKLAHOMA

INVENTION DEVELOPMENT SOCIETY, INC.

MUSTANG HANDICAP ASSOCIATION, INC.

NEW DAY TABERNACLE

OKLAHOMA CITY BEEP BASEBALL BOMBERS, INC.

OKLAHOMA FOUNDATION FOR THE DISABLED, INC.

THE OPEN DOOR ARTS, INC., a/k/a
THE OPEN DOOR ARTS COOPERATIVE

PROTECT ANIMAL LEAGUE

The United States Marshals Service personally served the following persons and entities having an interest in this action, on the dates indicated, to-wit:

ARNOLD D. BURLESON	Served February 11, 1992
KATHERINE M. BURLESON a/k/a KATHY BURLESON	Served February 11, 1992
KRISTI BURLESON	Served February 11, 1992, by serving her mother, Katherine M. Burleson
ARKANSAS INSTITUTE FOR SOCIAL JUSTICE	Served April 13, 1992, by certified mail
HANDICAPS UNLIMITED OF OKLAHOMA	Served January 16, 1992
INVENTION DEVELOPMENT SOCIETY, INC.	Served January 25, 1992 by serving William L. Enter, Sr.
MUSTANG HANDICAP ASSOCIATION, INC.	Served January 25, 1992 by serving William L. Enter, Sr.
OKLAHOMA CITY BEEP BASEBALL BOMBERS, INC.	Served January 17, 1992 by serving Ronald G. Whaley
OKLAHOMA FOUNDATION FOR THE DISABLED, INC.	Served January 16, 1992 by serving Timothy R. Tallchief, Director
THE OPEN DOOR ARTS, INC., d/b/a THE OPEN DOOR ARTS COOPERATIVE	Served March 17, 1992 by certified mail
PROTECT ANIMAL LEAGUE	Served January 17, 1992

United States Marshals Service 285s reflecting the services set forth above are on file herein.

All persons interested in the defendant properties hereinafter described were required to file their claims herein within ten (10) days after service upon them of the respective Warrants of Arrest and Notices In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

The following individuals and entities have filed Claims and/or Answers to all or part of the defendant properties. Some of the Claimants subsequently withdrew their claims, while others entered into Stipulations for forfeiture regarding their respective claims. These claimants and the dates whereby their Withdrawals of Claims or Stipulations for Forfeiture were filed are as follows:

ARKANSAS INSTITUTE FOR SOCIAL JUSTICE	Claim Withdrawn July 20, 1992.
INVENTION DEVELOPMENT SOCIETY, INC.	Stipulation for Forfeiture Filed October 1, 1992, providing for payment of $2,432.88 to the Claimant and consent to forfeiture of the rest of the defendant currency.
MUSTANG HANDICAP ASSOCIATION, INC.	Claim Withdrawn October 1, 1992.

OKLAHOMA CITY BEEP BASEBALL BOMBERS, INC.	Claim Withdrawn October 6, 1992.
OKLAHOMA FOUNDATION FOR THE DISABLED, INC.	Stipulation filed March 1, 1993, providing for payment of $37,500.00 to the Claimant and consent to forfeiture of the rest of the defendant currency.
THE OPEN DOOR ARTS, INC., a/k/a THE OPEN DOOR ARTS COOPERATIVE	Stipulation filed January 8, 1993, providing for payment of $1,800 to the Claimant and consent to forfeiture of the rest of the defendant currency.

The foregoing Stipulations and Withdrawals of Claims are all made a part hereof by reference, and thereby settle or otherwise conclude the claims of the above-named entities.

The following-named persons and entities upon whom personal service was effectuated more than thirty (30) days ago, failed to file their claim(s) or answer(s), as directed in the Warrant of Arrest and Notice In Rem on file herein:

KRISTI BURLESON

HANDICAPS UNLIMITED OF OKLAHOMA

PROTECT ANIMAL LEAGUE

Pursuant to Plea Agreement of Arnold D. Burleson on May 4, 1992, in Criminal Case No. 91-CR-56-E, and Plea Agreement of Katherine M. Burleson on April 1, 1992, in Criminal Case No. 92-CR-53-B, both in the United States District Court for the Northern District of Oklahoma, Arnold D. Burleson and Katherine M. Burleson entered into their respective Stipulations with the plaintiff, United States of America, consenting to the forfeiture of the defendant currency herein, in return for the government's agreement to credit $40,800 of the forfeited currency to the federal income tax liability of the Burlesons. These Stipulations were filed on August 31, 1992, and are made a part hereof by reference and are incorporated herein. The plaintiff, United States of America, and Katherine M. Burleson further stipulated that the plaintiff would file a Notice of Partial Dismissal, dismissing the defendant jewelry from this cause of action and providing for the return of all of the defendant jewelry to Katherine M. Burleson. The Notice of Partial Dismissal as to the defendant jewelry was filed herein on August 25, 1992 and is made a part hereof by reference and incorporated herein.

Although the United States Marshals Service was initially unable to serve upon Jacqueline Melissa Fisher, she was subsequently located and executed a Disclaimer of Interest in and to the $114,000 in United States Currency which was seized from a safe deposit box in her name at Security National Bank, Norman, Oklahoma, and $110,000 in United States Currency seized by the

Internal Revenue Service from her apartment. Both seizures occurred on January 23, 1991. The Disclaimer of Interest of Jacqueline Melissa Fisher was filed on July 31, 1992, and is made a part hereof by reference.

The United States Marshals Service was unable to effect service upon New Day Tabernacle, and due diligence and searching through the United States Postal Service, the Oklahoma Tax Commission, and other sources failed to provide an address where New Day Tabernacle could be served.

The United States Marshals Service gave public notice of this action and arrests of the defendant properties to all persons and entities by advertisement in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, on June 25, July 2, and July 9, 1992, and in The Daily Oklahoman (Metro), Oklahoma City, Oklahoma, on June 26, July 3, and July 10, 1992. Proof of these publications was filed on August 25, 1992.

It further appearing that no other claims, answers, or other defenses have been filed by the defendant properties or any persons or entities having an interest therein, and that no other persons or entities have any right, title, or interest in the defendant properties, or either of them.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Judgment be entered against the following-described defendant properties:

a) $450,445.91 in United States Currency, consisting of the following:

1) $10,698.70 in United States currency seized from Jackpot Bingo, Tulsa, Oklahoma;

2) $203,760.00 in United States currency seized from the residence of Arnold and Katherine Burleson, Tulsa, Oklahoma;

3) $10,716.00 in United States currency seized from Super Bingo, Oklahoma City, Oklahoma;

4) Cashier's check in the amount of $920.57, representing the contents of Bank Account No. 100-601-0 at First Southern Bank, Oklahoma City, Oklahoma, and its proceeds;

5) Cashier's Check in the amount of $350.64, representing the contents of Bank Account No. 100-581-2 at First Southern Bank, Oklahoma City, Oklahoma, and its proceeds;

6) $114,000.00 in United States currency seized from a safe deposit box in the name of Jackie Fisher at Security National Bank, Norman, Oklahoma;

7) $110,000.00 in United States currency seized from the apartment of Jackie Fisher, Norman, Oklahoma;

and that such properties be, and they hereby are, forfeited to the United States of America for disposition by the United States Marshals Service according to law.

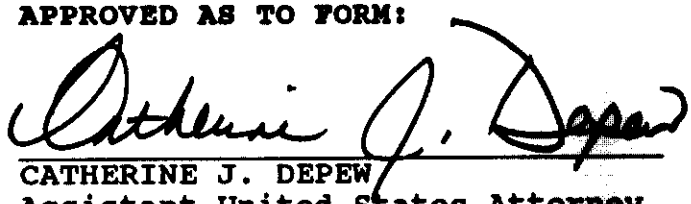
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the United States Marshals Service shall pay the amounts set forth below to the following claimants in full settlement of their claims herein, and further that the United States Marshals Service shall pay to the United States Department of the Treasury, Internal Revenue Service, the sum of $40,800.00, which shall be applied against the federal income tax liability of Arnold D. Burleson and Katherine M. Burleson.

INVENTION DEVELOPMENT SOCIETY, INC.	$ 2,432.88
OKLAHOMA FOUNDATION FOR THE DISABLED, INC.	37,500.00
THE OPEN DOOR ARTS, INC., a/k/a THE OPEN DOOR ARTS COOPERATIVE	1,800.00
INTERNAL REVENUE SERVICE	40,800.00

S/ JAMES O. ELLISON

JAMES O. ELLISON, CHIEF JUDGE
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPROVED AS TO FORM:



CATHERINE J. DEPEW
Assistant United States Attorney

CJD/ch

N:\UDD\CHOOK\FC\BURLESON\02402

ENTERED ON DOCKET

DATE 4-15-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RUDOLPH F. REYNOLDS,

Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 91-C-219-E

FILED

APR 14 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

Pursuant to the Mandate of the Tenth Circuit issued on the 8th day of February, 1993, this matter is remanded to the Secretary of the Department of Health and Human Services for further proceedings.

So ORDERED this 13th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

19

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAMES WESLEY HILL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	91-C-0376-B
	)	
RON CHAMPION,	)	
	)	
Defendant.	)	

ORDER

Now before this Court is a Motion To Dismiss.[1] Petitioner James Wesley Hill is now serving a 50-year sentence for the rape of a 14-year-old girl. In his habeas petition, he asserts four claims: 1) A newspaper article improperly biased the sentencing jury; 2) The trial court erred in its handling of expert testimony; 3) Prosecutorial misconduct; and 4) The trial court erred in its handling of the victim's testimony. For the reasons discussed below, the case is remanded to the state trial court for re-sentencing, as discussed before.

I. Procedural History/Facts

Hill was convicted of raping Sheila Bollinger, who was his girlfriend's 14-year-old daughter. The convictions stemmed from Hill's conduct in late 1984 when he lived at his girlfriend's house. He was arrested on November 6, 1984.

During trial, Lillian Hayes, a social worker with the Department of Human Services, testified about her interview with Bollinger concerning the sexual abuse complaint.[2] An

[1] *The Response To Petition For Writ Of Habeas Corpus is being treated as a Motion To Dismiss (see docket #18).*

[2] *Id. at 105.*

19

objection was sustained as to whether Lillian Hayes believed the victim's accusations.[3]

Petitioner also testified at trial, opening himself to inquiry by the prosecutor about a prior felony conviction.[4] The question produced an unexpected response that he had been "arrested for first degree rape last year."[5] This precipitated a statement by the prosecutor in his closing argument.

> He says, well my former convictions weren't of this nature. Oh really? Really? Assault and battery with a deadly weapon, a violent offense. And there's rape and there's sodomy and there's threats. I submit to you that a leopard doesn't change his spots.[6]

Furthermore, during the questioning of Petitioner, the prosecutor asked about a conviction of a different James Hill.[7] The Prosecutor acknowledged that this conviction was for someone other than the Petitioner. The Court then admonished the jury to disregard any reference to that conviction.[8]

Also, at trial, the court sustained the prosecutor's objection to the defense counsel asking 14-year-old Sheila Bollinger if she had ever accused her natural father of having sex with her.[9] The defense counsel wanted to show that it was a possibility that Sheila

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[3] *Id. at 110.*

[4] *Id. at 168.*

[5] *Id. at 169.*

[6] *Id. at 189.*

[7] *Id. at 172.*

[8] *Id. at 177-78.*

[9] *Id. at 71.*

had accused a man of doing this before.[10] The court would not let the defense follow this line of questioning unless they presented a witness that had knowledge of Sheila making false accusations.[11]

On September 30, 1985, a jury convicted Hill of two counts of First Degree Rape AFCF and of nine counts of Crimes Against Nature (oral sodomy) AFCF. However, prior to sentencing, a newspaper article appeared in the local newspaper.

In the article, an assistant district attorney was quoted as saying a person convicted of a crime would serve only 15 to 20 years on a 150-year-sentence.[12] Jurors read the article and discussed it when they sentenced Hill to 18 years for each of the nine Crimes Against Nature convictions and to 50 years for each of the two Rape convictions (212 years total.)[13] Once he found out about the jurors' conduct, the trial court judge stated:

> **So, I'm convinced that, you know, this did influence the jurors in the sentence and the recommendation that these run concurrent, or consecutively.**[14]

The judge -- in order to correct what he considered improper consideration by the jury -- then adjusted the rape sentences to run consecutively, followed by the sodomy sentences which were to run concurrently, reducing Hill's sentence to 68 years.[15]

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[10] *Id.*

[11] *Id. at 73.*

[12] *The Court of Criminal Appeals of the State of Oklahoma opinion at 2.*

[13] *Transcript of Sentencing at 25.*

[14] *Id. at 24.*

[15] *Transcript at 24-25.*

Hill appealed the convictions to the Oklahoma Court of Criminal Appeals. In a May 19, 1989 opinion, the appellate court reversed and remanded with instructions to dismiss all nine of the Crimes Against Nature counts.[16]

III. Legal Analysis

In his habeas petition, Hill asserts the following Sixth Amendment claims:

(1) Jurors were improperly influenced by newspaper article during sentencing of Petitioner;
(2) Improper testimony by the expert witness;

(3) Prosecutorial misconduct; and

(4) The trial court improperly handled the questioning with Sheila Bollinger.

A. The Newspaper Article

The first issue raised by the Petitioner is whether the jurors were improperly biased by the newspaper.[17] No case dealing with these exact circumstances was found. However, in *Goins v. McKeen*, 605 F.2d 947, 952-53 (6th Cir. 1979), a prejudicial newspaper article was published the second day of trial. The Sixth Circuit set out four factors a court should examine when determining whether such an article improperly biases jurors.[18]

The first factor is at what point in the proceedings the news article is read by the jurors. In the instant case, the article in this case was read during sentencing, which -- as

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[16] *Wrote the appellate court: "Appellant [Hill] alleges that the State failed to prove the element of penetration in the sodomy charges. The State confessed error on all of the sodomy counts. Penetration is an essential element of the crime against nature and must be proved beyond a reasonable doubt...The State, having failed to prove this element in all nine counts, we reverse and remand with instructions to dismiss all of the crimes against nature charges."*

[17] *The trial court did make a finding that the jury was "influenced" by the article. Transcript at 24.*

[18] *Neither party provides a standard to determine whether prejudice occurred.*

the trial judge found -- influenced the jury.[19]

The second factor considered in *Goins* was a determination if the newspaper article contained inadmissible information strongly probative of guilt. In this case, the article did not concern the guilt of the petitioner; however it did offer an opinion of parole law, which the jurors read. The judge found, and this Court agrees, that such information is improper for jurors to consider during sentencing.[20]

The third factor in *Goins* is whether the trial court took the appropriate steps to assure the "integrity and dignity of the trial." In this case, the record does show that the prosecutor and others talked to the jury after the trial, discovering the jury had read and discussed the newspaper article.[21] But it is unclear from the record as to what extent the judge discussed the article with the jury.[22]

The fourth factor focuses on whether the jurors, despite the newspaper article, remained impartial. As mentioned earlier, the trial court already found the jurors were improperly influenced by the newspaper article.

After examining these four factors, this Court finds that the newspaper article improperly biased the jurors during Hill's sentencing. The trial judge, in an effort to correct the error, reduced the sentence from 212 years to 68 years. Conceivably, this

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[19] *Although the jury recommended the sentences run consecutively, they only recommended 25 years for each rape count. A sentence of 10 years to life could have been recommended for these crimes.*

[20] *The Oklahoma Court of Criminal Appeals writes: "...in setting a sentence the jury should not be concerned with, or even aware of, possible reductions in time served granted by pardon and parole boards. Consideration of such evidence for this purpose is error, and may cause modification of a sentence. It is not within the province of the jury to consider such administrative matters." Goodson v. State, 562 P.2d 521, 526 (Okla. 1977).*

[21] *Id. at 23-24.*

[22] *Transcript of Sentencing at 23.*

action would have resolved the problem; however, when the Oklahoma Court of Criminal Appeals reversed the nine Crimes Against Nature convictions, the net effect was to shave another 18 years from Hill's sentence.[23]

A similar situation occurred in *U.S. Ex Rel. Mota v. Fairman*, 624 F.Supp. 789 (N.D.Ill. 1985) where several counts were merged during sentencing. On appeal, several of the convictions were reversed. The court stated:

> **[W]hen the invalidity of the conviction on one count which *may* have influenced the sentence becomes apparent on an appeal, whether on direct or collateral attack, the proper course is usually to vacate the sentences and remand for resentencing on the valid counts without consideration of the invalid one.** *Id.* **at 792.**

A remand of a case is "appropriate if there is a possibility that the trial judge might have been led to impose a heavier sentence than he otherwise would have because he considered convictions that were later determined to be invalid." *Id.* In this case, it is unclear as to how the trial judge would have adjusted the sentence if the Petitioner had not been convicted of the nine Crimes Against Nature counts. Therefore, this Court orders the case be remanded to the state trial court for resentencing.

B. The Trial Court's Handling of Testimony From The Expert and The Victim

The second and fourth issues raised by the Petitioner are whether he was denied a fair trial as a result of testimony by the expert witness, due to restrictions placed on the defense in pursuing a line of questioning with Bollinger.

> **State court rulings on the admissibility of evidence may not be questioned in federal habeas proceedings unless they render the trial**

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[23] *The jury had initially sentenced Hill to 18 years for each of the nine sodomy counts to be served consecutively (162 years). The trial judge changed the sentence so each count would run concurrently (18 years). Consequently, when the Oklahoma Court of Criminal Appeals overturned the nine sodomy convictions, 18 years was shaved from Hill's sentence. He is now serving a 50-year term on the two rape counts.*

> so fundamentally unfair as to constitute a denial of federal constitutional rights. ***Brinlee v. Crisp***, 608 F.2d 839, 850 (10th Cir. 1979)

As one court states, "there is little point in case-by-case federal review of evidentiary rulings...The federal interest lies in ensuring that states conduct their criminal process in a way likely to separate the guilty from the innocent...not in second guessing every evidentiary ruling."[24] Both issues raised by Hill concern evidentiary rulings, and, as a result, this Court finds they are without merit for purposes of federal habeas corpus relief.

C. Prosecutorial Misconduct

Hill claims he was denied a fair trial due to prejudicial remarks and misconduct by the prosecutor. The Petitioner objected to a remark made by the prosecutor in his closing argument that "a leopard doesn't change his spots." The prosecutor was referring to testimony by the Petitioner about prior crimes, including an unanticipated response about an arrest for first degree rape.[25]

> [P]rosecutorial misconduct in a state court violates a criminal defendant's federal constitutional rights only if the prosecutor's actions so infect the trial with unfairness as to make the resulting conviction a denial of due process. ***Robison v. Maynard***, 829 F.2d 1501, 1509 (10th Cir. 1987) (quoting ***Donnelly v. DeChristoforo***, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974).

In *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986), where the prosecutor referred to the defendant as an "animal" in the closing argument, the court

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[24] *Lee v. McCaughtry, 933 F.2d 536, 538 (7th Cir. 1991).*

[25] *The petitioner also raised a concern about testimony elicited by the prosecutor from Sheila Bollinger about an argument between her mother and the Petitioner. Furthermore, the Petitioner was concerned about a conviction brought out by the prosecutor of another James Hill. The court told the jury to disregard this conviction. Similar to prior issues raised by the Petitioner, these concern evidentiary rulings by the state court which are not appropriate in a federal habeas corpus proceeding unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights. Brinlee v. Crisp, supra.*

held the comments did not deprive the petitioner of a fair trial. Although the comments may have been improper, it "is not enough that the prosecutor's remarks were undesirable or even universally condemned." *Id.*

In this case, an objection was sustained to the comment by the prosecutor. The judge reiterated to the jury that the prior convictions should only be used for purposes of assessing credibility and not to prove that another crime had been committed. Consequently, the undersigned finds that the prosecutor's conduct did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process."

III. Conclusion

After careful review of the record, the undersigned finds that habeas claims 2,3 and 4 are without merit for the reasons discussed above. However, in respect to claim 1, this Court finds that the jurors were improperly influenced by the newspaper article read during Hill's sentencing proceedings. Therefore, the case is REMANDED to the trial court for resentencing, taking into account time already served. The resentencing should take place no longer than 90 days from the date of this Order. Upon failing to so act, Hill shall be released and the sentence deemed served in toto. In addition, once the trial court acts, Respondents shall immediately notify this Court.

SO ORDERED THIS 14 day of April, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE APR 15 1993

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 14 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOYCE PENNER, et al,

Plaintiff(s),

vs.

CECILL W. MAGILL, et al,

Defendant(s).

No: 92-C-686-B

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 14th day of April, 1993.

UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA
THOMAS R. BRETT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RITA M. HOPKINS,)
)
Plaintiff,)
)
v.) 92-C-89-B
)
LOUIS W. SULLIVAN,)
)
Defendant.)

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed March 10, 1993 in which the Magistrate Judge recommended that the case be remanded. The ALJ must examine the evidence submitted by Dr. Little and claimant's other treating physicians. He must then give it substantial weight or he may discount it. If he chooses the latter, he must give specific and legitimate reasons for doing so.

The Court also orders on remand that another medical examination of Hopkins be done to determine the extent of her present and past "abdominal problems." The record now simply shows that she had several surgeries in 1969 and that she complained of "indigestion" problems in the last few years. The Vocational Expert testified that if Hopkins' testimony was true, she would not be able to return to work. This testimony must be fully explored in the context of claimant's actual and complete medical condition, including abdominal problems. Consequently, additional medical findings will clarify the extent of such problems. Once such findings are made, the ALJ can determine whether abdominal or other stomach problems, if extant should be included in the hypothetical to

the Vocational Expert. An additional hearing shall be held in view of the foregoing and further testimony taken from the Vocational Expert with reference made to the whole of Claimant's medical condition.[1]

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed, as set forth above.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

SO ORDERED THIS 14 day of April, 1993.

THOMAS R. BRETT, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

[1] *Hearing by the ALJ is not an exercise to determine how little the ALJ can put to the Vocational Expert. Here, given the testimony by the Vocational Expert with regard to abdominal problems, the ALJ should have specifically addressed same to the Vocational Expert.*

mks

OBA #5026

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOYCE PENNER; ERIC PENNER by his next friend, JACKIE W. PENNER; BRANDICE PENNER, by her next friend JACKIE W. PENNER and JACKIE W. PENNER, individually,

Plaintiffs,

vs.

CECIL W. MAGILL, JUDITH A. DOWNER d/b/a PACIFIC RV TRANSPORT, and CONTINENTAL BAKING,

Defendants.

Case No. 92-C-686-B

ORDER APPROVING SETTLEMENT AGREEMENT WITH MINOR, BRANDICE PENNER, AND DISMISSAL WITH PREJUDICE

NOW on this 14th day of April, 1993, the joint application for an order dismissing with prejudice the claim of brandice penner, a minor, brought by her next friend, jackie w. Penner, and an order approving settlement agreement with minor came on before the court for hearing. The court having previously heard testimony on March 8, 1993, of a witness sworn and statement of counsel and being fully advised of the premises finds as follows:

That on the 11th day of August, 1990, the parties hereto were involved in an automobile accident. That as a result of the automobile accident, the minor claimant, Brandice Penner, was allegedly injured, and a claim has arisen against the defendants that is disputed both as to liability and damages. The parties

have reached a compromise agreement and have requested that the court approve the settlement of the minor, Brandice Penner. The court finds that Jackie W. Penner is the proper party to act on behalf of the minor child and that he is competent and is hereby appointed guardian ad litem.

The court finds that a compromise agreement has been reached wherein the defendants have offered to pay to the minor, Brandice Penner, by and through her parent and next friend, Jackie W. Penner, the sum of $1000.00 subject to attorney's fees, representing full payment for pain and suffering, both past and future, permanent disability, disfigurement and any other claim the minor child may now have or which may arise in the future, known or unknown, resulting from the accident. The court finds no trust as required as the net amount for the minor is below $1000.00.

The court finds that the plaintiffs have reached an informed decision to waive the right to trial by jury. They are fully aware of the consequences of settlement of this matter and are aware that once the court approves this settlement, and the settlement proceeds have been paid, that the minor, even after reaching the age of majority, shall be forever barred from making any additional claims as a result of the subject accident, even if the medical condition of the minor child does not continue as presently anticipated or shall unexpectedly change for the worse after the settlement.

The court finds that the parties have agreed, and the court so orders, that the settlement with the minor child is subject to attorney fees only and shall not be subject to any claims for

outstanding medical bills or other claims against the settlement proceeds as those claims are being concluded by a separate settlement with the parents of the minor child.

The court has heard testimony as to the medical condition of the minor child, and as to the other elements of damage and liability in the case, and finds that the settlement agreement is fair, equitable and in the best interest of the minor child. Said settlement agreement is entered into free from fraud, coercion or duress by any of the parties, their agents, insurers or attorneys. Said agreement is hereby approved by the court.

The court finds that Earl Wolfe and Darlene Robinson, as attorneys for the injured minor and the parent and next friend, are entitled to receive an attorney's fee and cost reimbursement out of the minor's settlement in the amount of $ 383.33 . The court finds that said fee is reasonable and is hereby approved.

The court further finds that the parties have agreed that Magistrate Judge Leo Wagner is authorized to hear the testimony and approve the settlement as to the minor child, Brandice Penner.

The court finds and hereby orders that the proposed settlement as set forth above, should be and is hereby approved. The court finds that the settlement proceeds have been paid pursuant to the settlement agreement and the claim of Brandice Penner, by and through her father and next friend, Jackie W. Penner, is hereby ordered dismissed with prejudice against all defendants.

s/ John Leo Wagner
LEO WAGNER, MAGISTRATE JUDGE
of the United States District Court for the Northern District of Oklahoma

APPROVED AS TO FORM AND CONTENT:

EARL WOLFE
Attorney for plaintiffs

DENNIS KING
Attorney for Cecil W. Magill and
Pacific RV Transport

RICHARD CARPENTER
Attorney for Norman C. Walker
and Continental Baking Company

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation,

Plaintiff,

vs.

ELCO AUTO SYSTEMS, INC., et al.,

Defendants.

No. 92-C-609-E

ORDER AND JUDGMENT

The Court has for consideration the following pending motions: at docket #25, Plaintiff asks the Court to enter final judgment as to Defendant Strauss pursuant to Rule 54(b) Fed.R.Civ.P.; at docket #28 appears Plaintiff's unopposed Motion for Summary Judgment against Defendant Laskey. Both motions will be GRANTED. Defendant Strauss concurs with Plaintiff's Rule 54(b) motion. Plaintiff's Rule 56 motion should also be granted upon the undisputed facts and evidence offered in support thereof.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Enter Final Judgment is granted; Plaintiff's Motion for Summary Judgment is granted against Defendant John T. Laskey as guarantor in the amount of $697,506.45 including post-judgment interest calculated on all amounts, including the judgment herein and pre-judgment interest at the rate of 3.41% per annum. Costs and attorney fees may be awarded upon proper application.

So ORDERED this 13th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

REPUBLIC FINANCIAL CORPORATION,)
)
Plaintiff,)
)
v.) 91-C-478-B
)
REPUBLIC TRUST & SAVINGS COMPANY,)
)
Defendant.)

ORDER

On March 24, 1993, the Tenth Circuit Court of Appeals filed the following Order:

> **On consideration of the stipulation of the parties, the appeals are dismissed as moot. This matter is remanded to the district court with instructions to vacate the judgment appealed and remand to the bankruptcy court with instructions to vacate the underlying judgment.** *(See docket #44).*

Therefore, this Court vacates its August 28, 1992 Order. This Court also remands the case to the Bankruptcy Court. On remand, the Bankruptcy Court shall vacate its June 25, 1991 Order and the underlying judgment. Furthermore, the case is dismissed with prejudice, and, according to the joint stipulation, each party will pay its own attorney fees and costs.

SO ORDERED THIS 13 day of April, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

8

DATE APR 14 1993

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

REPUBLIC FINANCIAL CORPORATION,)
)
Plaintiff,)
)
v.)
)
REPUBLIC TRUST & SAVINGS COMPANY,)
)
Defendant.)

91-C-478-B
91-C-479-B

FILED
APR 13 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

On March 24, 1993, the Tenth Circuit Court of Appeals filed the following Order:

> On consideration of the stipulation of the parties, the appeals are dismissed as moot. This matter is remanded to the district court with instructions to vacate the judgment appealed and remand to the bankruptcy court with instructions to vacate the underlying judgment. *(See docket #44).*

Therefore, this Court vacates its August 28, 1992 Order. This Court also remands the case to the Bankruptcy Court. On remand, the Bankruptcy Court shall vacate its June 25, 1991 Order and the underlying judgment. Furthermore, the case is dismissed with prejudice, and, according to the joint stipulation, each party will pay its own attorney fees and costs.

SO ORDERED THIS 13 day of April, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

45

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LORETTA THOMPSON,

Plaintiff,

vs.

BRIDGESTONE/FIRESTONE, INC.,

Defendant.

Case No. 92-C-1140-B

FILED

APR 13 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes before this Court on the Joint Stipulation of Dismissal with Prejudice of the parties. The parties desire to dismiss the above styled action in its entirety, with each party to bear his, her or its costs and attorneys fees.

IT IS THEREFORE ORDERED that the above styled action is dismissed in its entirety with prejudice, each party to bear its costs and attorneys fees.

ENTERED this 13 day of April, 1993.

S/ [illegible]

Judge of the District Court

DATE APR 14 1993

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 12 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ROBERT LEE THOMAS, JR., et al)
)
Plaintiff(s),)
)
vs.) No: 92-C-336-B
)
REXWORKS, INC.,)
)
Defendant(s).)

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by Magistrate Judge John Leo Wagner that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 12th day of April, 1993.

UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA
THOMAS R. BRETT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LORETTA THOMPSON,

Plaintiff,

vs.

BRIDGESTONE/FIRESTONE, INC.,

Defendant.

Case No. 92-C-1140-B

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes before this Court on the Joint Stipulation of Dismissal with Prejudice of the parties. The parties desire to dismiss the above styled action in its entirety, with each party to bear his, her or its costs and attorneys fees.

IT IS THEREFORE ORDERED that the above styled action is dismissed in its entirety with prejudice, each party to bear its costs and attorneys fees.

ENTERED this 13 day of April, 1993.

S/ THOMAS R. BRETT

Judge of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TONY RAY BREWER,

Plaintiff,

vs.

DOPEC SERVICE & SUPPLY COMPANY,

Defendant.

Case No. 92-C-506-B

ORDER

Now on this 12 day of ~~February~~ April, 1993, this matter coming on for hearing on the Plaintiff's Request to Dismiss Without Prejudice (Docket #9), the Court finds the Request should be granted and the above styled case is hereby dismissed without prejudice.

IT IS SO ORDERED THIS 12th DAY OF APRIL, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In re: Virgil Edward Bullock, Debtor, SCOTT P. KIRTLEY, Successor Trustee, Plaintiff, vs. DR. LYNDAL M. BULLOCK, et al., Defendants.	Bankruptcy Case 81-00162-W (Chapter 7) Adversary #90-0222-W Dist. Ct. #91-C-187-E (Consolidated with Dist. Ct. # 91-C-121-E)

O R D E R

Defendants Dr. L. M. Bullock, H. C. Bullock and V. Linebarger appeal from the Amended Pre-Trial Order of the Bankruptcy Court filed February 22, 1991, insofar as it bars the Defendants from asserting issue preclusion or res judicata in the fraud proceedings. Defendants cite Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329 (10th Cir. 1988) in support of their position that a claim preclusion or res judicata bars the Successor Trustee from reasserting claims raised by the previous Trustee, which claims were dismissed. It is worthy of some note that in Petromanagement the claims at issue were dismissed with prejudice thus imposing an actual bar to relitigation, analogous to the effect of a ruling on the merits. In the instant case, as both Judge Cook and the Circuit noted, the claims were previously dismissed without prejudice, which obviously does not preclude reassertion of the claims. The distinction is, thus, pivotal and

10

dispositive. Defendants' request that this Court vacate the portion of the Pre-Trial Order disallowing their preclusion and res judicata defenses will, accordingly, be denied.

So ORDERED this 6th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

mks

OBA #5026

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOYCE PENNER; ERIC PENNER by his next friend, JACKIE W. PENNER; BRANDICE PENNER, by her next friend JACKIE W. PENNER and JACKIE W. PENNER, individually,

Plaintiffs,

vs.

CECIL W. MAGILL, JUDITH A. DOWNER d/b/a PACIFIC RV TRANSPORT, and CONTINENTAL BAKING,

Defendants.

FILED

APR 13 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-686-B

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW Joyce Penner, Jackie W. Penner, and Eric Penner, now an adult, Cecil W. Magill, Pacific RV Transport, Normah Cecil Walker, and Continental Baking Company, and pursuant to Rule 41 of Federal Rules of Civil Procedure, hereby stipulate that the claims of Joyce Penner, Eric Penner, and Jackie W. Penner are hereby dismissed with prejudice.

EARL WOLFE
Attorney for plaintiffs

DENNIS KING
Attorney for Cecil W. Magill and Pacific RV Transport

RICHARD CARPENTER
Attorney for Norman C. Walker and Continental Baking Company

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CAROLYN S. PRICE-BARTON,

Plaintiff,

v.

JOE D. PRICE

Defendant.

Case No. 92-C-1133-E

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Carolyn S. Price-Barton, and Defendant, Joe D. Price, hereby jointly stipulate, pursuant to Rule 41(a)(1) and (c) of the Federal Rules of Civil Procedure, to dismissal of the above-entitled action, including any and all claims asserted by Price-Barton in her Petition and any and all claims asserted by Price in his Counterclaim, with prejudice, each party to bear its own costs.

DATED this 9th day of April, 1993.

G. W. TURNER III

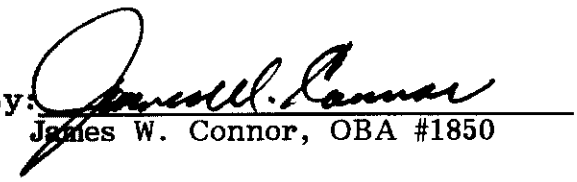
By: G. W. Turner III, OBA #11182

CONNER & WINTERS

A Professional Corporation
2400 First National Tower
15 East 5th Street
Tulsa, Oklahoma 74103-4391
(918) 586-5711

Attorneys for Defendant
JOE D. PRICE

JAMES W. CONNOR

By: 
James W. Connor, OBA #1850

SELBY, CONNOR, MADDUX & JANER
416 East 5th Street
P. O. Drawer Z
Bartlesville, Oklahoma 74005-5025
(918) 336-8114

Attorneys for Plaintiff
CAROLYN S. PRICE-BARTON

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In the Matter of the Arbitration Between:	)	
PUBLIC SERVICE COMPANY OF OKLAHOMA,	)	
Applicant,	)	
vs.	)	No. 92-C-1196-E
BURLINGTON NORTHERN RAILROAD COMPANY,	)	
Respondent.	)	

JUDGMENT DISMISSING ACTION BY REASON OF ARBITRATION

The Court has been advised by counsel that this action is being submitted for arbitration to the Arbitrator appointed by Order of this Court. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the action is dismissed without prejudice to any of the parties herein. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within six (6) months that arbitration has not been completed or that it has failed to dispose of the issues in the case and further litigation is therefore necessary.

ORDERED this 12th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHILLIP LEE HULL, a minor, by his natural parents, guardians and personal representatives, PHILLIP GENE HULL AND TANYA LEE HULL, husband and wife, and PHILLIP GENE HULL, Individually, and TANYA LEE HULL, Individually,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 88-C-1645-E

AMENDED AND RESTATED
ORDER AND FINAL JUDGMENT

The Judgment of this Court entered on the 7th day of April, 1993 will stand. The Order of the Court entered on the same date is amended and restated as follows:

Separate judgments for money damages under Fed.R.Civ.P. Rule 54(b) have been entered for Phillip Gene Hull, Tanya Lee Hull, and Phillip Lee Hull in sums agreed upon by Plaintiffs and Defendant in the Agreed Statement of Damage Awards filed November 30, 1992. The Court finds that these judgments for money damages are final.

Concerning the separate issue of interest on the money damage judgments, the Court sustains in part Defendant's Fed.R.Civ.P. Rule 59 motion filed March 4, 1993, to amend the Revised Third Amended Findings of Fact and Conclusions of Law. As requested by the government, the Court under this Order will terminate post-judgment interest on October 21, 1992, the day before the date of the

240

mandate of affirmance per 31 U.S.C. 1304(B)(1)(A) (post-judgment interest commencing June 5, 1991, as held by the Tenth Circuit).

The Court finds that the balance of the government's Rule 59 motion filed March 4, 1993, is denied.

The Court further finds that the Rule 54(b) motion of the United States, taken together with the Joint Motion for Entry of a Rule 54(b) Judgment filed December 18, 1992, is granted and the Court has entered a separate Judgment for Phillip Gene Hull and Tanya Lee Hull as aforesaid.

The Court further finds that the motion of the United States to alter or amend the Third Amended Findings of Fact and Conclusions of Law filed February 24, 1993, has been rendered moot by the revised Third Amended Findings of Fact and Conclusions of Law filed on February 22, 1993.

The Court further finds that the motion of the United States for permission to file a reply brief will be allowed.

The Court found at the March 31, 1993, hearing that it was not in the position to mandamus the United States at this point (Transcript Page 17); the Court further found that it did not think that it was appropriate under these facts to attempt to resolve this matter by mandamus (Transcript Page 43 and 44).

SO ORDERED and ADJUDGED.

DATED this 13th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

SPOOR-WESTON, INC.;
LESLIE G. WESTON; and
CORNELIA SPOOR-WESTON;
Debtors,

LESLIE G. WESTON and
CORNELIA SPOOR-WESTON,

Defendants-Appellants,

vs.

SCOTT P. KIRTLEY, Trustee,

Plaintiff-Appellee.

No. 92-C-413-E

ORDER AND JUDGMENT

COMES NOW BEFORE THE COURT FOR CONSIDERATION the Appeal of Defendants from an Order of the bankruptcy court for the Northern District (docket #1). For the reasons stated herein we affirm.

Statement of the Case

Debtors herein filed a Chapter 11 petition in bankruptcy on March 16, 1990. On the same day, the debtors converted $21,000.00 in non-exempt assets (i.e. a Cash-Management Account with Merrill Lynch) to exempt assets by paying said amount to Local Bank in reduction of the principal amount of their mortgage note. This and other disbursements left the debtors without any non-exempt assets. The debtors thereafter claimed a homestead exemption, and an unsecured creditor objected to the pre-petition conversion.

In August of 1991, the debtors converted their case to a Chapter 7 bankruptcy. The Trustee, Appellant herein, pursued the

objection to the claimed homestead exemption.

On May 4, 1992, Judge Wilson, writing for the Bankruptcy Court for the Northern District of Oklahoma, denied the homestead exemption to the extent of the $21,000.00 pre-petition conversion, granted the Trustee a lien on the homestead, and stayed foreclosure for a period of three months. It is from this order that debtors appeal.

Issues Presented

Appellants herein presents only one issue appropriate for review by this Court:[1] Whether the Bankruptcy Court abused its discretion in determining that the debtors converted their assets with actual intent to defraud?

Review of the Bankruptcy Court Decision

Review of the decision of the Bankruptcy Court, denying in part the debtors' claimed homestead exemption upon finding the debtors converted their assets with an actual intent to defraud creditors, is conducted under the "clearly erroneous" standard enunciated in In re: Mueller, 867 f.2d 568, 570 (10th Cir. 1989). Therefore, unless this Court finds that the Bankruptcy Court clearly abused its discretion, reversal is not warranted.

The issue presented by this appeal is that of whether the Bankruptcy Court abused its discretion in finding that the debtors

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[1] Debtors' brief also raises the following two issues: (a) whether the bankruptcy court's decision falls outside its scope of authority, and (b) whether the bankruptcy court's decision is in conflict with the purpose of the Bankruptcy Code and the public interest. These issues, having not been raised before the bankruptcy court, are not appropriate for our review.

converted their property with an actual intent to defraud their creditors. The underlying facts are essentially undisputed and are as follows.

The initial schedules, filed by former counsel for the debtors on March 19, 1990, did not disclose the pre-petition conversion of the cash-management account nor the payment down on the principal amount of the mortgage. The debtors did disclose this conversion in their Initial Report, filed the 29th of March, 1990. Until the initial meeting of the Creditors, held on April 12, 1990, the debtors were ostensibly unaware of the omission in the initial schedules. On April 21, 1990, the debtors filed amended statements of their financial affairs so as to accurately reflect the fact of payment on the mortgage. Until the payment of the $21,000.00, the debtors had only paid the normal monthly payments. Local Bank had not required the $21,000.00 payment and the normal monthly note payments were not in arrears.

The Tenth Circuit Court of Appeals has made it clear that both a finding of a pre-petition conversion of a non-exempt asset into an exempt asset and a finding of an actual intent to defraud creditors is necessary to deny discharge of the otherwise exempt asset. In re: Carey, 938 F.2d 1073, 1077 (10th Cir. 1991). The Tenth Circuit has acknowledged that the cases are "peculiarly fact specific" and "the activity in each situation must be viewed individually." Id. at 1077. In reviewing the facts of a given case, the Tenth Circuit suggests that courts look to the following factors as indicia of "intent to defraud": (1) whether the debtor

conceals the pre-bankruptcy conversion, (2) whether the conversion takes place immediately before the debtor files bankruptcy, (3) whether the debtor gratuitously transfers the property, (4) whether the debtor continues to use the transferred property, (5) whether the debtor transfers the property to family members, and (5) the monetary value of the assets converted. Carey at 1077 (citations omitted).

In Carey, the Tenth Circuit was confronted with a situation similar to, yet distinguishable from, the one presented here. The debtor, Carey, liquidated her own stock portfolio, loaned the proceeds to Carey Lumber, and then consented to mortgaging her exempt homestead and liquidating other assets. Despite the influx of funds to her husband's business, Carey Lumber, it was still forced to file a voluntary petition in bankruptcy under Chapter 11. One of the creditors of Carey Lumber was left with a $2,000,000.00 deficiency, and thereafter sought to enforce the personal guarantees against the individuals. Debtor Carey filed her own bankruptcy petition two years later. The Creditor cited the following acts of Carey as evidence of intent to defraud:

(1) In September, 1986, Carey and her husband refinanced their homestead by signing a mortgage note calling for a three-year payment period with no prepayment penalty.
(2) On October 14, 1986, just six days before Carey Lumber filed for bankruptcy, Carey received a $27,200.00 payment from Carey Lumber.
(3) In December 1986, Carey granted her father a mortgage on a fourplex for a six-year antecedent debt. In March, 1988, Carey deeded the property to her father in lieu of foreclosure.
(4) On June 19, 1987, Carey became sole owner of their residence (formerly held in joint tenancy) by deed from her husband for no consideration.
(5) On December 12, 1987, Carey transferred her stock in

Carey Properties, Inc. to Carey, Inc., a corporation controlled by her husband for $500.00. Carey Properties is a real estate management company.

(6) On December 17, 1987, the Careys transferred their interest in a "vacation real estate" partnership to the other general partners. The Careys have continued to use the property, however, through payments to the partnership.

(7) From May 1985 to April 1987, Carey liquidated essentially all her remaining nonexempt assets to pay down the mortgage on her homestead. This included jewelry and two cars ($22,800), a one-half interest in the assets of Carey Equipment Company ($16,226.48), an interest in a Colorado time-share condominium development ($34,300) and all available earned income and tax refunds.

Despite these essentially undisputed facts in Carey, the Tenth Circuit could not find that either the Bankruptcy Court or the District Court had erred in finding no intent to defraud:

> Although there is substantial evidence in the record of prebankruptcy planning to pay down Carey's mortgage with non-exempt assets, we must accept that actions to "hinder, delay, or defraud a creditor" within 11 U.S.C. §727(a)(2) require something more than that, and we do not find enough to hold that the bankrutpcy and district courts erred.
>
> * * *
>
> ....Carey's negotiating a mortgage to permit prepayment of principal without penalty does not infer any fraud on creditors; especially since the prior mortgage note had a one-year due date, and apparently had no prepayment penalty.
>
> * * *
>
> ....The liquidation of the other assets used to pay down the home mortgage occurred over a two year period and was in the open; the activity and payment appears to be consistent with what has been approved by Congress to take advantage of exemptions. Carey fully disclosed all payments and transfers in her bankruptcy schedules and at the meeting of creditors. Carey retained no beneficial interest in any converted property. She did not obtain credit to purchase exempt property. Under these circumstances, we cannot say that the district and bankruptcy courts erred in finding she did not intend to "hinder, delay or defraud" her creditors or acted improperly in relation to her homestead.

Carey at 1077-78 (citations omitted). Therefore, this type of "pre-bankruptcy planning" may not be indicative of an intent to "delay, hinder or defraud," and reversal may not be warranted.

Although similar, the facts of Carey are distinguishable from those presented here by the Westons. To begin, the liquidation of assets and payments on the mortgage by the Westons were made on the same day as the initial schedules were filed. Moreover, the payments were made outside of the ordinary course of the debtors' business.[2] Further, debtors were acting on the advice of counsel with the intent to hide their assets from potential creditors. Finally, as Judge Wilson indicated in his opinion, these "...debtors intended to finesse their way through cram-down by paying the estate its own money." Although pre-bankruptcy planning alone may not always be indicative of fraud, this Court cannot find that the Bankruptcy Court abused its discretion in finding from these facts an actual intent to "delay, hinder, or defraud."

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Order of the Bankruptcy Court for the Northern District, filed the 4th day of May, 1992, in the above-styled matter, is hereby affirmed AND the Appellants' action is hereafter dismissed on the merits.

SO ORDERED this 13th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

[2] Clearly an issue of credibility was presented to the bankruptcy court. Its resolution thereof shall be given great deference by this Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

SPOOR-WESTON, INC.;
LESLIE G. WESTON; and
CORNELIA SPOOR-WESTON;
Debtors,

LESLIE G. WESTON and
CORNELIA SPOOR-WESTON,

Defendants-Appellants,

vs.

SCOTT P. KIRTLEY, Trustee,

Plaintiff-Appellee.

No. 92-C-413-E

O R D E R

COMES NOW BEFORE THE COURT FOR CONSIDERATION the Appellant's Petition for Common Law Writ of Prohibition (docket #6) and the Appellants objections thereto (docket #7). The Appellant herein correctly notes that the Tenth Circuit Court of Appeals has held that Writs of Prohibition are a "drastic and extraordinary" remedy which are not to be used as substitutes for appeal, and which should only be granted when the Petitioner has shown a "clear abuse of discretion" and a "clear and undisputable" right to such relief. In re: Vargas, 723 F.2d 1461, 1468 (10th Cir.), cert. denied, 105 S.Ct. 90 (1983). Because the Appellants herein have an appeal pending with this Court concerning the same issues addressed in their Petition for Writ of Prohibition, the Court finds that resort to such a "drastic and extraordinary" remedy is not appropriate.

IT IS THEREFORE ORDERED that Appellant's Petition for Writ of

24

Prohibition (docket #6) is hereby denied.

ORDERED this 13th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KATHY L. RYALS,

Plaintiff,

v.

CITY OF TULSA, et al,

Defendants.

91-C-0693-E

ORDER

Now before the court are two summary judgment motions: a Motion For Summary Judgment (docket #39) brought by the City of Tulsa and a Motion For Summary Judgment *(docket #53)* brought by Roy C. Johnson.

The motions came after Plaintiff Kathy Ryals' filed a lawsuit alleging the following claims: 1) Retaliatory prosecution under §1983 against both Defendants; 2) Excessive force under §1983 against Johnson; 3) False arrest under §1983 against both Defendants, and 4) Malicious prosecution under Oklahoma law against the Defendants.[1]

For the reasons stated below, each Motion For Summary Judgment is granted in favor of Defendants on the false arrest claim. The motions are denied as to the remaining claims.

I. Factual Overview

Without delving overmuch into the facts, this action is brought because of the re-filing of a municipal Driving Under the Influence Charge. At the time the original charge

[1] *Malicious prosecution can be a basis for a §1983 claim, but Ryals has only asserted a state tort malicious prosecution cause of action.*

94

was heard against Plaintiff, the City of Tulsa asked the Municipal Criminal Court of Record to dismiss the case "for lack of prosecutorial merit".[2] Following a colloquy between the court and counsel, Plaintiff agreed to pay the court costs and the case was dismissed, the Assistant City Prosecutor stating, **"...it's my understanding that if we dismiss, costs to the defendant, it pretty much is like a dismissal with prejudice."**

Thereafter, the case was assigned to yet another Assistant City Prosecutor and refiled.[3] Following Ryals' re-arrest she sought a Writ of Prohibition from the Oklahoma Court of Criminal Appeals, asking that court to prohibit the "new" prosecution. On December 10, 1990 the Court granted the Writ, prohibiting the City from further prosecution.

After the appellate court's ruling, the DUI charge was dropped against Ryals. On February 19, 1991, Ryals filed a Tort Claim Notice against the City for false arrest and malicious prosecution concerning the April 23, 1990 arrest. That claim was denied, prompting her to file this action on September 5, 1991.

II. Legal Analysis

In this case, Ryals asserts four claims: 1) Retaliatory prosecution by the City and by Johnson; 2) Malicious prosecution by Johnson and/or the City; 3) False arrest by Johnson

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[2] *Plaintiff appeared in the Municipal Criminal Court of Record on February 22, 1990, having been originally arrested on September 30, 1989.*

[3] *The facts show that Defendant Johnson was "angry about the dismissal" and went to speak with the City Prosecutor, Mr. Alvin Hayes, interestingly, his former lawyer when Mr. Hayes was in private practice. Charges were re-filed on April 18, 1990, and a warrant issued for Ryals' arrest. Again, interestingly, once the warrant issued Defendant Johnson took it upon himself to go out and re-arrest Ryals, working as a member of the "warrants task force". She was re-arrested on April 23, 1990 – notwithstanding the fact that she had counsel, and, that the City well knew that fact. No attempt was made to request a voluntary surrender, nor was any courtesy extended in light of the unusual circumstances in this case.*

and/or the City; and 4) Excessive force by Johnson.[4]

It is these claims which are now subject of the pending dispositive motions.[5]

A. Retaliatory Prosecution

Ryals claims the City and Johnson retaliated against her because she filed two complaints and a Tort Claim notice. The test for retaliatory prosecution is set out by the Fifth Circuit:

> The Court should consider whether the plaintiffs have shown, first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct. If the Court concludes that the plaintiffs have successfully discharged their burden of proof on both of these issues, it should then consider...whether the State has shown by a preponderance of the evidence that it would have reached the same decision as to whether to prosecutor even had the impermissible purpose not been considered. *Wilson*

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[4] *Plaintiff's Second Amended Complaint states the following claims:*

1. Johnson, acting under color of state law, caused the City Prosecutor's Office to refile the DUI charge in retaliation for Ryals' exercise of her First and Fourteenth Amendment rights in bringing complaints against Johnson for his conduct during the September 30, 1989 arrest.

2. Johnson, acting under color of state law, wrapped his seat belt around her neck and drove her to the police station. Ryals alleges that such an action was unreasonable and excessive force.

3. The City Prosecutor's Office, acting as the final policymaker for the City, violated the Plaintiff's First, Fourth and Fourteenth Amendment rights by prosecuting the Plaintiff on or about April 16, 1990, on the refiled charge of Driving Under the Influence...without probable cause. In addition, Ryals claims that the City either acted in concert with Johnson for the purpose of retaliation or at the request of Defendant Johnson.

4. Johnson, a city employee, maliciously caused Ryals to be prosecuted the second time on the DUI charge. Second Amended Complaint (docket #27).

[5] *Rule 56, Fed.R.Civ.P. states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."*

Under Rule 56, the moving party must first inform the court of the basis for the motion. It then must identify those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," which demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Once the moving party meets its initial burden, the non-moving party must set forth evidence, raising genuine issues of material fact per Rule 56(c). A court must accept as true the non-moving party's evidence and must draw all legitimate inferences in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

v. Thompson, 593 F.2d 1375, 1387 (5th Cir. 1979).

In this case, the first prong of the test is met as Ryals had a constitutionally protected right to file the complaints and the Tort Claim notice. The second prong of the test is the crucial issue here: **Do questions of material fact exist on whether Defendants' decision to re-file was motivated, at least in part, by a purpose to retaliate or deter Ryals from filing her complaints?** Upon review of the evidence, when same is viewed in the light most favorable to Plaintiff, the court finds that questions of material fact exist concerning both the City's and Johnson's conduct on the retaliatory prosecution claim.[6] *See, Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528, 531 (9th Cir.1985).

The next issue raised by the City is whether it should be held liable for Newbold's decision to re-file the charges. A municipality may be held liable under §1983 where unconstitutional conduct resulting in injury to plaintiff was caused by "execution of a government's policy or custom." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1978). But municipalities cannot be liable simply under the theory of *respondent superior*. *Id.* at 690, 98 S.Ct. at 2036.

Municipal liability usually attaches when officials with final policymaking authority in the subject area at issue make decisions depriving a constitutional right. *City of St. Louis*

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[6] *The evidence in the record indicates: (1) When the case was first dismissed, Porter believed the case was "pretty much ... like a dismissal with prejudice."; (2) Both Porter and the Municipal Judge believed that such an agreement, either as a local custom or a matter of honor code, to be binding; 3) The Oklahoma Court of Criminal Appeals found such a re-filing to be illegal; 4) When the DUI charge was dismissed the first time, an angry Johnson asked Hayes, his former attorney, to re-file the DUI charge; (5) Hayes assigned the case to Assistant City Prosecutor Newbold for review; (4) Among other things, Newbold both knew about Ryals' complaints and he also talked to Johnson before reaching his decision to re-file; (6) Newbold decided to re-file; (7) That under the circumstances, Newbold's decision was unusual compared to policy in his office; and 8) The charge was re-filed after Plaintiff filed the complaints against Johnson and the Tort Notice Claim.*

v. Praprotnik, 485 U.S. 112, 123, 108 S.Ct. 915, 924 99 L.Ed.2d 107 (1988).[7] Questions of material fact remain on whether policymaking authority was delegated to Assistant City Proecutor Newbold, or, whether City Prosecutor Hayes, in effect, ratified Newbold's decision to re-file. In addition, it is unclear as to whether a policy, formal or informal, existed in the City Prosecutor's office on the re-filing of charges.[8] Therefore, Ryals may proceed to trial on her municipal liability claims.

B. The False Arrest Claim

The facts show that a valid warrant was issued against the Plaintiff on the DUI charge. Therefore, a false arrest claim cannot stand. *See, Burt v. Ferrese,* 871 F.2d 14, 17 (3rd Cir. 1989).[9] Summary judgment is granted in favor of Defendants on this issue.

C. Malicious Prosecution

To prove malicious prosecution, Ryals must show: (1) the Defendant's institution of the former action; (2) its termination in favor of Plaintiff; (3) Defendant's want of probable cause for pressing the former suit against Plaintiff; (4) the presence of malice in defendant's conduct; and (5) damages. ***Reeves*** *v. Agee,* 769 P.2d 745, 751 (Okla. 1989). The first two elements have been met.

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[7] *It is the responsibility of the trial judge to identify those officials or government bodies who, as a matter of state law, have final policymaking authority concerning the action alleged to have caused a constitutional violation. Jett v. Dallas Independent School District, 491 U.S. 701, 736-737, 109 S.Ct. 2702, 2723, 105 L.Ed.2d 598 (1989). Once the court has made such a determination, "it is for the jury to determine whether [the policymakers] decisions have caused the deprivation of rights at issue." Id.*

[8] *It is unclear as to what type of policy, if any, existed. Porter states that no such policy existed; however, Newbold's testimony suggests some type of informal policy was in place.*

[9] *Writes the court: "The distinction between false imprisonment and malicious prosecution in the area of arrest depends on whether or not the arrest was made pursuant to a warrant...The malicious filing of a false complaint which causes the issuance of a warrant upon which one is arrested does not give rise to a cause of action under false imprisonment. The action must be one for malicious prosecution." Although this case discusses New York law in Broughton v. State, 373 N.Y.S.2d 87, 335 N.E. 2d 310 (1975), the undersigned finds that the same result would obtain under Oklahoma law.*

There is no question that probable cause existed for Ryals' first arrest. No constitutional violation for a malicious prosecution claim occurs when a valid warrant or probable cause supports an arrest, regardless of the arresting officer's motives. *Smith v. Gonzales,* 670 F.2d 522 (5th Cir.1982).

However, the focus of this issue is whether Defendants had probable cause for pressing the second DUI charge against Ryals. The Oklahoma Supreme Court states:

> Probable cause in a malicious prosecution does not mean legal cause. If it did, every plaintiff who failed to recover in his lawsuit could be liable to an action for malicious prosecution. Probable cause has been defined as reasonable cause that of an honest suspicion or belief on the part of the investigator thereof, founded upon facts sufficient strong to warrant the average person in believing the charge to be true...What constitutes probable cause is a mixed question of law and fact. *Young v. First State Bank,* 628 P.2d 707, 710 (Okla. 1981).

In this case, there yet remains a material question of fact. Johnson's repeated efforts to get the charge re-filed, and his continued involvement with the case after dismissal raises a real question as to existence of malice. Therefore, summary judgment on this issue is denied to both Defendants.[10]

D. Excessive Force By Johnson

The "reasonableness" of a particular use of force must be judged from the perspective of the reasonable officer on the scene, rather than with 20/20 vision of hindsight. *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). The question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to underlying intent or

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[10] *The City is correct that prosecutorial immunity on the malicious prosecution claim should be recognized in this case. However, it does not follow that a municipality cannot be held liable when their prosecutors are entitled to prosecutorial immunity. See Brummett v. Camble, 946 F.2d 1178, 1182 (5th Cir.1991).*

motivation. *Id.*

In this case, Johnson, Baumann and Ryals all agree that Ryals attempted to escape the patrol car and resisted the officers' efforts to restrain her. A question of material fact remains, however, as to whether Jonson's conduct was "reasonable" under the circumstances then present, and specifically, in light of Royal's disruptive behavior. A jury should be allowed to answer this question. Therefore, Defendants' respective Motions for Summary Judgment are also denied.

III. Conclusion

The Notes of the Advisory Committee on Rule 56 state that "where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate." The court must review the facts, drawing all inferences most favorable to Ryals, the non-moving party.

Against this backdrop, the court finds that Defendants' respective Motions for Summary Judgment on Plaintiff's claim of false arrest are GRANTED. However, genuine issues of material fact exist concerning Plaintiff's remaining claims.

Therefore, Defendants' respective Motions For Summary Judgment (docket #s 39 and 53) are GRANTED IN PART AND DENIED IN PART, as set forth above.

SO ORDERED THIS 13th day of April, 1993.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT EUGENE ROSTECK,

Petitioner,

v.

RON CHAMPION,

Respondent.

92-C-500-B

ORDER

This order pertains to Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1)[1], Respondent's Motion to Dismiss (Docket #5), Petitioner's Response to Respondent's Motion to Dismiss (Docket #6), Petitioner's Motion for Evidentiary Hearing (Docket #7), and Petitioner's Motion for Adjudication of Petition for Writ of Habeas Corpus (Docket #8).

Petitioner was convicted in Tulsa County District Court, Case No. CRF-84-4860, of forcible sodomy, robbery with a firearm, and kidnapping, and sentenced to 100, 75, 100, 50, and 100 years imprisonment.

Petitioner now seeks federal habeas relief on the alleged grounds that: (1) there is no adequate available state post-conviction corrective judicial process to protect his constitutional rights; (2) new developments in the law establish that the state failed to present sufficient evidence to establish his guilt; (3) his sentence was improperly enhanced by a prior conviction based on an invalid guilty plea; (4) the trial court erred by admitting the judgment and sentence and docket sheet pertaining to the prior conviction; (5) he

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

received ineffective assistance of counsel during his trial; (6) the trial court denied his right to due process by failing to hold an evidentiary hearing on his application for modification of sentence; and (7) the trial court erred in barring his claims in the appeal for post-conviction relief on the basis of his failure to raise the issues on appeal.

Respondent's Motion to Dismiss alleges petitioner has failed to exhaust his state remedies in regard to several of the grounds for relief raised by him.

Title 28 U.S.C. § 2254 provides in part:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

It is clear that a petitioner must completely exhaust all state remedies before coming to the federal courts. A federal habeas petitioner must give the state courts a fair opportunity to decide the substance of the federal claims. Anderson v. Harless, 459 U.S. (1982). A "rigorously enforced" exhaustion policy is necessary to serve the end of protecting and promoting the State's role in resolving the constitutional issues raised in federal habeas petitions. Naranjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982).

In Rose v. Lundy, 455 U.S. 509, 510 (1982), the Supreme Court held that a federal habeas corpus petition which contained exhausted and unexhausted claims (a "mixed

petition") should be dismissed by the federal habeas corpus court:

> Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

When petitioner filed the direct appeal of his conviction in Case No. F-85-736, he raised the following claims: (1) the trial court erred in overruling his motion to suppress his statement, (2) the trial court erred in overruling his demurrer to the evidence, particularly regarding the charge of attempted rape, and (3) the trial court erred in admitting the judgment and sentence and docket sheet of defendant's prior conviction. (See Exhibit "A" to Respondent's Motion to Dismiss). The Oklahoma Court of Criminal Appeals reversed the conviction for attempted rape with instructions to dismiss it, finding insufficient evidence to support the conviction, and affirmed the remaining convictions. (See Exhibit "B" to Respondent's Motion to Dismiss).

On August 19, 1988, petitioner filed a petition for writ of habeas corpus in the District Court for the Northern District of Oklahoma, Case No. 88-C-999-C (See Exhibit "C" to Respondent's Motion to Dismiss). This petition was dismissed on April 19, 1989 for failure to prosecute (See Exhibit "D" to Respondent's Motion to Dismiss). On October 6, 1988, petitioner filed a second petition for writ of habeas corpus in the District Court for the Northern District of Oklahoma, Case No. 88-C-1378-E (See Exhibit "E" to Respondent's Motion to Dismiss). In this petition, petitioner alleged only that the Oklahoma Court of Criminal Appeals had erred in failing to reverse or modify his remaining four convictions. The court denied the petition on November 22, 1988 (See Exhibit "F" to Respondent's

Motion to Dismiss). Petitioner appealed this decision to the United States Court of Appeals for the Tenth Circuit in Case No. 88-2897, and the appeal was dismissed (See Exhibit "G" to Respondent's Motion to Dismiss).

On July 6, 1990, petitioner filed an application for post-conviction relief in Tulsa County District Court, raising the following allegations of error: (1) ineffective assistance of appellate counsel, (2) petitioner was deprived of due process because the record of his prior conviction was altered, (3) the Oklahoma Court of Criminal Appeals erred in failing to modify or reverse his remaining sentences or order a new trial, and (4) the trial court erred in admitting the judgment and sentence and docket sheet of his prior conviction, because it allowed the jury to speculate about the former conviction. His application was denied and petitioner did not appeal this ruling. (See Exhibit "H" to Respondent's Motion to Dismiss).

On March 17, 1992, petitioner filed his second application for post-conviction relief in Tulsa County District Court, raising the following allegations of error: (1) the trial court lacked jurisdiction because the State failed to file an amended second page alleging the prior conviction, (2) new developments in the law show that the State failed to present sufficient evidence that petitioner was guilty of the prior conviction, (3) the trial court lacked jurisdiction to conduct a two stage trial, (4) ineffective assistance of trial counsel for failure to object to two stage trial, (5) the trial court erred in failing to conduct an evidentiary hearing on petitioner's first application for post-conviction relief, and (6) ineffective assistance of appellate counsel for failure to raise the issue concerning the petitioner's prior conviction. His application was denied and petitioner did not appeal this

ruling. (See Exhibit "I" to Respondent's Motion to Dismiss).

Petitioner raises several new claims in his present petition for a writ of habeas corpus which have not been presented to the state courts for consideration. Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1) is dismissed for failure to exhaust state remedies as to several grounds in the petition. Petitioner's Motion for Evidentiary Hearing (Docket #7) and Petitioner's Motion for Adjudication of Petition for Writ of Habeas Corpus (Docket #8) are moot.

Dated this 7 day of April, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM CRAIG BUIS and MIKALEAN JANE BUIS,

Plaintiffs,

vs.

THE CITY OF TULSA, OKLAHOMA, a municipal corporation, et al.,

Defendants.

No. 91-C-992-E

JUDGMENT

This action came on for consideration before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiffs take nothing from the Defendants, that the action be dismissed on the merits, and that the Defendants recover of the Plaintiffs their costs of action.

ORDERED this 9th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

41

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 12 1993

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN H. FRAZIER; EDITH MARIE ROOD f/k/a EDITH MARIE FRAZIER a/k/a EDITH M. FRAZIER; GARY B. CUPPS a/k/a GARY BILL CUPPS, JR.; LISA M. CUPPS a/k/a LISA MICHELE CUPPS a/k/a LISA MICHELE CEARLEY; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED
APR 9 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 93-C-11-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 9th day of April, 1993. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, John H. Frazier and Edith Marie Frazier, appears by Eric Sines, Esq.; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, appears not, having previously disclaimed any right, title or interest in the subject property; the Defendant, County Treasurer, Tulsa County, Oklahoma, appears by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, Gary B. Cupps a/k/a Gary Bill Cupps, Jr. and Lisa M. Cupps a/k/a Lisa Michele Cupps a/k/a Lisa Michele Cearley, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, John H. Frazier, was served with Summons and Complaint on February 23, 1993; the Defendant, Gary B. Cupps a/k/a Gary Bill Cupps, Jr., was served with Summons and Complaint on February 22, 1993; that Defendant, Lisa M. Cupps a/k/a Lisa Michele Cupps a/k/a Lisa Michele Cearley, was served with Summons and Complaint on February 12, 1993; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 8, 1993; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 8, 1993.

It appears that the Defendants, John H. Frazier and Edith Marie Frazier, filed their Answer and Cross-Claim on March 15, 1993; that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on January 28, 1993; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on January 28, 1993, disclaiming any right, title or interest in the subject property; and that the Defendants, Gary B. Cupps a/k/a Gary Bill Cupps, Jr. and Lisa M. Cupps a/k/a Lisa Michele Cupps a/k/a Lisa Michele Cearley, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Nine (9), Block Three (3), WEE RANCHO ADDITION to Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on March 22, 1984, the Defendants, John H. Frazier and Edith Marie Frazier, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of $32,400.00, payable in monthly installments, with interest thereon at the rate of 12.5 percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, John H. Frazier and Edith Marie Frazier, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated March 22, 1984, covering the above-described property. Said mortgage was recorded on March 23, 1984, in Book 4776, Page 2698, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, John H. Frazier and Edith Marie Rood f/k/a Edith Marie Frazier a/k/a Edith M. Frazier, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, John H. Frazier and Edith Marie Rood f/k/a Edith Marie Frazier a/k/a Edith M. Frazier, are indebted to the Plaintiff in the principal sum of $31,043.73, plus interest at the rate of 12.5 percent per annum from May 1,

1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $5.40 for service of Summons and Complaint.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $7.00 which became a lien on the property. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, Gary B. Cupps a/k/a Gary Bill Cupps, Jr. and Lisa M. Cupps a/k/a Lisa Michele Cupps a/k/a Lisa Michele Cearley, are in default and have no right, title or interest in the subject real property.

The Court further finds that Gary B. Cupps a/k/a Gary Bill Cupps, Jr. and Lisa M. Cupps a/k/a Lisa Michele Cupps a/k/a Lisa Michele Cearley are liable to John H. Frazier and Edith Marie Frazier for any amounts for which John H. Frazier and Edith Marie Frazier are held liable to the Plaintiff in this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, John H. Frazier and Edith Marie Rood f/k/a Edith Marie Frazier a/k/a Edith M. Frazier, in the principal sum of $31,043.73, plus interest at the rate of 12.5 percent per annum from May 1, 1992 until judgment, plus interest thereafter at the current legal

rate of 3.67 percent per annum until paid, plus the costs of this action in the amount of $5.40 for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $7.00 for personal property taxes against Gary B. Cupps, Jr. and Lisa M. Cupps for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Gary B. Cupps a/k/a Gary Bill Cupps, Jr., Lisa M. Cupps a/k/a Lisa Michele Cupps a/k/a Lisa Michele Cearley and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that John H. Frazier and Edith Marie Frazier recover judgment against Gary B. Cupps a/k/a Gary Bill Cupps, Jr. and Lisa M. Cupps a/k/a Lisa Michele Cupps a/k/a Lisa Michele Cearley for any amounts John H. Frazier and Edith Marie Frazier are adjudged liable to Plaintiff in this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, John H. Frazier and Edith Marie Rood f/k/a Edith Marie Frazier a/k/a Edith M. Frazier, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern

District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa, Oklahoma, in the amount of $7.00 personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

ERIC M. SINES, OBA #15144
Attorney for Defendants,
John H. Frazier and Edith Marie Frazier

J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendant,
County Treasurer,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-11-E

PB/esr

APR 1 2

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BESSIE LAYTON, individually and as next friend of JOSHUA LEE LAYTON and RACHEL LYNN LAYTON, minors,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MAYES, SHERIFF WILEY BACKWATER, UNDER-SHERIFF RONNIE PACK, DISPATCHER, JANETTE WHITE,

Defendants.

FILED

APR 9 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

92-C-066-B

ORDER OF DISMISSAL

FOR GOOD CAUSE SHOWN the Defendant Pack be and he is hereby dismissed from this action.

S/ THOMAS R. BRETT

JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAMELA M. ST. LOUIS f/k/a PAMELA M. SHANNON, COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 92-C-229-B

ORDER
VACATING JUDGMENT OF FORECLOSURE AND
ORDER OF SALE AND DISMISSING WITHOUT PREJUDICE

This matter comes on before the Court on this 7th day of April, 1993, upon the Motion of the Plaintiff, United States of America, for an Order of this Court vacating the Judgment of Foreclosure entered on November 10, 1992, vacating the Order of Sale issued on December 4, 1992, and dismissing this action without prejudice. The Court, having considered the motion and the records and files in this case, and being fully advised in the premises, finds that good cause has been shown for the relief sought and that the motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Judgment of Foreclosure entered in this case on November 10, 1992, be, and the same is hereby vacated, set aside and held for naught.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Order of Sale issued on December 4, 1992, be, and the same is hereby vacated, set aside and held for naught.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action be, and the same is hereby dismissed without prejudice.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

WYN DEE BAKER, OBA #465
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARK ANTHONY THORNTON,)
)
Plaintiff,)
)
v.) 92-C-140-B
)
THE STATE OF OKLAHOMA,)
)
Defendants.)

ORDER

Now before this Court is a Motion To Dismiss *(docket #25)* and a Writ of Mandamus *(Docket Nos. 8 & 19).*[1] Petitioner Mark Anthony Thornton filed a habeas petition under 28 U.S.C. §2254. Respondents contend that his claims are either without merit or procedurally barred. For the reasons discussed below, the Motion To Dismiss is granted, and the Writ of Mandamus is denied.

I. Summary of Procedural History

On March 9, 1987, Thornton was sentenced to 20 years in prison after pleading guilty to Larceny of an Automobile After Former Conviction of Two of More Felonies. Thornton pled guilty in open court, acknowledging that his plea was voluntary. What follows is a portion of the exchange between Thornton and the trial judge concerning his appeal time:

> JUDGE: With regard to, Mr. Thornton, your rights to appeal, you are advised of the following: You have the right to file a petition in the Court of Criminal Appeals for a Writ of Certiorari; that is, a request for that Court to review this judgment and

[1] *Respondents' response to Thornton's habeas petition will be treated as Motion To Dismiss.*

AC

sentence. It may be granted or denied. To appeal from this conviction on your plea of guilty you must file an application to withdraw the plea of guilty within ten days from this date setting forth in detail the grounds for such withdrawal of the plea...Do you understand that sir?

Thornton: Yes sir.

JUDGE: You are also advised...that a petition for a Writ of Certiorari must be filed in the Court of Criminal Appeals within 90 days from this date. Notice of such filing must be given within five days thereafter by serving a copy of the petition for Writ of Certiorari on the prosecuting attorney who prosecuted the petitioner and on the Attorney General. Do you understand that, sir?

Thornton: Yes sir.

During the hearing, Thornton also said he was satisfied with the representation of his counsel. In addition, he stated that he did not intend to appeal the plea agreement. See, Transcript of Sentencing, March 9, 1987.

Thornton did not file a direct appeal of his conviction, but, on April 3, 1991, filed an Application For Post-Conviction Relief. He raised the following claims in the Application: 1) The trial court committed error by not showing a factual basis existed for his guilty plea; 2) Ineffective assistance of counsel; 3) Improper enhancement of his sentence; 4) Unconstitutional pre-trial identification procedures; 5) The State failed to prove beyond a reasonable doubt that he had prior convictions; 6) A violation of due process because he did not receive true notice of the charge against him; 7) Improper statements by the prosecutor; 8) Improper notice of his prior convictions; 9) The trial court should have stricken the second page of the Information; 10) Denial of a fair trial because the prosecution unconstitutionally commented on his right to remain silent; and 11) Double jeopardy. *Exhibit B, Response (docket #25).*

Thornton's Application For Post-Conviction Relief was denied by the Tulsa County District Court. The court first found that Thornton's ineffective assistance of counsel claim had no merit under *Strickland v. Washington*.[2] The court wrote the following about Thornton's remaining claims:

> **The petitioner was advised of the right to appeal and the record reflects the petitioner waived his right to appeal. In any event, petitioner took no steps to attempt or perfect a timely direct appeal. Nor has the petitioner offered any reason for the petitioner's failure to file a timely direct appeal of petitioner's conviction...the failure to file a timely direct appeal waives all issues which could have been raised on appeal unless a sufficient reason is given for failure to do so...The Court finds that no appeal has been sought or perfected, nor has any sufficient reason been offered by the petitioner for petitioner's failure to do so. Therefore, the Court finds that the petitioner has waived these remaining issues and petitioner's Application is denied.** *See Exhibit C of Response (docket #25).*

The Oklahoma Court of Criminal Appeals affirmed the lower court's decision on May 11, 1992. On April 4, 1991, Thornton's request to appeal out of time was denied by the Tulsa District Court and subsequently affirmed by the Oklahoma Court of Criminal Appeals.

Then, on July 8, 1992, Thornton filed a Petition For Writ Of Habeas Corpus Pursuant to 28 U.S.C. §2254 *(docket #15)*. In the habeas Petition, Thornton makes essentially the same claims as he did in his Application For Post-Conviction Relief. Prior to filing this petition, Thornton also filed a Writ of Mandamus requesting production of certain trial documents *(docket #8)*.

II. Legal Analysis

Thornton's habeas Petition raises two issues: 1) Is he procedurally barred on claims he did not raise on direct appeal?; and 2) Is he entitled to habeas relief based on his claim of ineffective assistance of counsel? Both are discussed below.

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[2] *466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.*

A. Procedural Bar

Thornton failed to file a direct appeal, and, as a result, the state court found that he had waived 10 of his 11 claims. Therefore, Thornton must show either cause and prejudice for failure to raise the claims on direct appeal, or, he must show that a fundamental miscarriage of justice will occur if those claims are not examined on their merits. *Coleman v. Thompson,* 111 S.Ct. 2546 (1991). Thornton has not made such a showing. As a result, federal habeas review is barred on all claims except the ineffective assistance of counsel claim.

B. Ineffective Assistance of Counsel

As a general rule, claims of ineffective assistance of counsel may be categorized into two groups: 1) those claims primarily founded upon external factors, and 2) those founded upon the misconduct of the trial lawyer. *United States v. Gambino*, 788 F.2d 938, 950 (3rd Cir. 1986). Allegations of lawyer misconduct, may be further divided into 1) incompetence of counsel due to specific errors or omissions during the course of representation, and 2) an actual conflict of interest adversely affecting counsel's performance. *Id.* at 951.

In this case, Thornton neither alleges a conflict of interest nor does he allege that external factors hampered his right to counsel. Instead, he contends that his attorney was incompetent due to specific errors and omissions. Thornton says these errors were made prior to the entry of his guilty plea.

When a Petitioner, such as Thornton, claims his counsel erred, the court applies a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 80 L.Ed. 674 (1984). The *Strickland* standard applies to alleged ineffective assistance during a guilty plea. *United States v. Estrada,* 849 F.2d 1304, 1307 (10th Cir.1988).

Therefore, Thornton would be entitled to relief if 1) his attorney's performance fell below an objective standard of reasonableness, and 2) but for counsel's errors, Thornton would have insisted on going to trial. *Id.*

In *Strickland*, the Supreme Court noted that courts should not play the role of a Monday-morning quarterback.[3] The attorney's actions must be evaluated at the time they were taken to "eliminate the distorting effects of hindsight". *Id.* at 2065. Furthermore, a court "must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance." *Id.*

Thornton accuses his counsel of the following errors: 1) Counsel failed to discuss the plea and its ramifications with him; 2) Counsel failed to file a Motion To Compel The State To Conduct A Line-up; and 3) Counsel failed to establish a factual basis for the plea.

As discussed, the court must indulge a strong presumption that the conduct of Thornton falls within the *wide range* of professional assistance. After reviewing the record, Thornton has not shown that his attorney's performance fell below that objective standard of reasonableness.[4] Specifically, the court made clear inquiry of Thornton regarding his understanding of the plea, and Thornton plainly had the opportunity to voice his concerns at that time.

III. Conclusion

Of Thornton's eleven habeas claims, 10 are procedurally barred as he has not met

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[3] *In Strickland, the Court writes: "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it's all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission was unreasonable." Id. at 2065.*

[4] *There is a strong presumption that an accused statements in open court and under oath as to the voluntariness of a guilty plea are true. See, United States v. Ellison, 835 F.2d 687, 693 (7th Cir. 1987). Thornton, after being informed by the judge of the consequences of his plea, pled guilty. In addition, no evidence in the record -- beyond Thornton's bare allegations -- show that his counsel committed constitutional error in advising him. In addition, the attorney's decision to not file a Motion To Conduct A Line-up is also without merit.*

either the cause-and-prejudice test or shown that a fundamental miscarriage of justice will take place by this Court's failure to review the merits of those claims.

In addition, Thornton has not shown sufficient evidence to state an ineffective assistance of counsel claim. Thornton pled guilty in open court, telling the judge that he was satisfied with his attorney's performance. And, while he now claims his attorney constitutionally erred, this Court can find no evidence supportive of such a proposition. Therefore, the Motion To Dismiss *(docket #25)* is GRANTED. The Writ of Mandamus is denied *(Docket Nos 8 & 19)*. In addition, the Request for Expedited Review is now moot (Docket No. 30).

SO ORDERED THIS 8 day of apr., 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT LEE THOMAS, Plaintiff, and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA Intervenor vs. REXWORKS, INC., a Delaware Corporation, Defendant.	Case No. 92-C-336-B

STIPULATED ORDER OF DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED, by and between counsel for all parties hereto subject to the approval of the Court, as follows:

1. All claims presented by the Amended Complaint shall be dismissed with prejudice as to all parties pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

2. Each party shall bear his or its own costs, expenses and attorneys fees.

DATED: April 7, 1993.

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ATTORNEYS FOR DEFENDANT
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C:\WORD\REX\PLEADING\DISMISSA.sa

01193860.01

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINEAR FILMS, INC., an Oklahoma corporation,

Plaintiff,

v.

MIDWEST FORAGE PRODUCTS, INC., an Ohio corporation, and THEODORE GERBER, an individual,

Defendants.

Case No. 91-C-943-E

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff, Linear Films, Inc. ("Linear"), and Defendants Midwest Forage Products, Inc. ("Midwest"), and Theodore Gerber ("Gerber") (collectively "Defendants"), pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate to the dismissal, with prejudice, of all claims and counterclaims asserted in this action, and which could have been asserted in this action, by Linear against Defendants, or by Defendants against Linear.

Respectfully submitted,

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Richard J. Cipolla, OBA # 13674
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Attorneys for Plaintiff Linear Films, Inc.

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Craig W. Hoster, OBA # 4384
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Attorneys for Defendants Midwest Forage Products, Inc., and Theodore Gerber

UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 9 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BEVERLY HUTSON,
an individual,

Plaintiff,

v.

FORD MOTOR CREDIT CO.
a corporation,

Defendant.

Case No. 92-C-1057-E

ENTERED ON DOCKET
DATE APR 12 1993

ORDER

NOW on this 9th day of April, 1993, pursuant to the Joint Stipulation For Dismissal filed by the parties, it is hereby ORDERED, ADJUDGED AND DECREED that all claims and causes of action filed in this case are hereby dismissed with prejudice, with all parties to bear their own costs, attorneys' fees and expenses.

UNITED STATES DISTRICT JUDGE

320.93A.NEV

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARRY G. HILL; STACEY L. HILL a/k/a STACY L. HILL; GLENN D. HILL; LOIS M. HILL; ARKANSAS STATE BANK; COUNTY TREASURER, Delaware County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Delaware County, Oklahoma,

Defendants.

CIVIL ACTION NO. 91-C-953-E

DEFICIENCY JUDGMENT

This matter comes on for consideration this 9th day of April, 1993, upon the Motion of the Plaintiff, United States of America, acting through the Farmers Home Administration, for leave to enter a Deficiency Judgment. The Plaintiff appears by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and the Defendants, Garry G. Hill and Stacey L. Hill a/k/a Stacy L. Hill, appear neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that a copy of Plaintiff's Motion was mailed by first-class mail to Garry G. Hill and Stacey L. Hill a/k/a Stacy L. Hill, Route 2, Box 36, Siloam Springs, AR 72761, and to all answering parties and/or counsel of record.

The Court further finds that the amount of the Amended Judgment rendered on June 8, 1992, in favor of the Plaintiff United States of America, and against the Defendants, Garry G. Hill and

34

Stacey L. Hill a/k/a Stacy L. Hill, with interest and costs to date of sale is $109,459.87.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Amended Judgment of this Court entered June 8, 1992, for the sum of $50,100.00.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on the 9th day of March, 1993.

The Court further finds that the Plaintiff, United States of America acting through the Farmers Home Administration, is accordingly entitled to a deficiency judgment against the Defendants, Garry G. Hill and Stacey L. Hill a/k/a Stacy L. Hill, as follows:

Principal Balance plus pre-Judgment Interest as of 6-8-92	$106,607.25
Interest From Date of Judgment to Sale	1,836.44
Title Work	410.00
Abstracting	220.00
Recording Fees	20.00
Publication Fees of Notice of Sale	141.18
Court Appraisers' Fees	225.00
TOTAL	$109,459.87
Plus Defendants' Glenn D. Hill and Lois M. Hill's Judgment as first lienholders of Principal Balance plus pre-Judgment interest as of 6-8-92	$ 44,349.32
SUM OF JUDGMENT WITH COSTS OF PLAINTIFF PLUS PRIOR JUDGMENT OF HILLS	$153,809.19
Less Credit of FmHA Appraised Value	60,000.00
PLAINTIFF'S DEFICIENCY	**$ 93,809.19**

plus interest on said deficiency judgment at the legal rate of 3.67 percent per annum from date of deficiency judgment until paid.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America, acting through the Farmers Home Administration, have and recover from Defendants, **Garry G. Hill and Stacey L. Hill a/k/a Stacy L. Hill**, a deficiency judgment in the amount of **$93,809.19**, plus interest at the legal rate of 3.67 percent per annum on said deficiency judgment from date of judgment until paid.

James O. Ellison
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

F. L. DUNN, III
United States Attorney

Wyn Dee Baker

WYN DEE BAKER, OBA #465
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

DATE APR 12 1993

FILED
APR 8 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
DONALD P. TAYLOR,	)	
	)	Bky. No. 86-03503-C
Debtor,	)	
	)	
DONALD P. TAYLOR,	)	Adversary No. 90-0278-W
	)	
Plaintiff/Appellee,	)	
	)	Case No. 92-C-431-B
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant/Appellant.	)	

ORDER

This order pertains to Debtor's Motion to Alter or Amend (Docket #10)[1]. Debtor asks the court to alter or amend its Order of March 16, 1993 pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to reflect that the Bankruptcy Court decision was not clearly erroneous, that debtor was not a responsible person under 26 U.S.C. § 6672(a), that debtor did not have the responsibility to collect and pay the taxes, that debtor did not willfully fail to perform his duties, and that a tax penalty for ten quarters could not be assessed in the first quarter of 1984.

A motion to amend or alter a final judgment under Fed.R.Civ.P. 59(e) "cannot be used to raise arguments which could, and should have been made" before the trial court entered the final judgment. Simon v. United States, 891 F.2d 1154, 1159 (5th Cir. 1990);

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

17

Woods v. City of Michigan City, Indiana, 940 F.2d 275, 280 (7th Cir. 1991). Such a motion is not to provide "a disappointed suitor with a post-judgment opportunity to argue that which could have been argued pre-judgment." Johnson v. City of Richmond, 102 F.R.D. 623, 623 (E.D. Va. 1984). Rather it is "a means for quickly correcting mistakes in the form or provisions of a judgment or even a mistake in the entry of the judgment itself where the mistake is caused by such things as a misapprehension on the part of the judge as to the issues raised, the stipulations made, the procedural posture, or other such matters which were not the issue adversarily presented to and decided by the judgment." Id.

Debtor has presented several of the same arguments raised in his response to the United States' appeal to this court from the final Judgment Order and Memorandum Opinion of the Bankruptcy Court for the Northern District of Oklahoma dated May 5, 1992. He claimed in that appeal that the Bankruptcy Court's order was not clearly erroneous and that debtor was not responsible under 26 U.S.C. § 6672(a) for the collection and payment of corporate withholding taxes and did not willfully fail to do so. This court considered these arguments and disposed of them in its Order of March 16, 1993.

Debtor presents to the court an internal policy statement of the Internal Revenue Service dated February 2, 1993, which states that "[i]n general, non-owner employees who act solely under the dominion and control of others, and who are not in a position to make independent decisions on behalf of the business entity, will not be asserted the trust fund recovery penalty." However, this court has already found in its March 16, 1993 Order that the record showed that debtor "possessed a sufficient degree of authority over corporate decisionmaking to make him a 'responsible person.'" These issues need not be re-addressed

at this time.

However, the court erred in finding in its March 16, 1993 Order that:

> The United States has a valid claim against Donald P. Taylor for unpaid social security, unemployment, and employee income taxes of Delta in the amount of $117,162.26 plus interest and the notice of Federal Tax Lien filed March 31, 1986, and refiled August 13, 1987, is valid and enforceable. It is therefore ordered that the decision of the Bankruptcy Court dated May 5, 1992, is hereby REVERSED and this matter is REMANDED to the Bankruptcy Court for entry of judgment in accordance with this Order.

At the hearing on March 16, 1992 before the Honorable Stephen J. Covey, Judge of the United States Bankruptcy Court for the Northern District of Oklahoma, debtor raised the issue of whether the IRS properly assessed debtor for the taxes in question for all the quarters included in the unpaid amount of $117,162.26. (Transcript of Hearing on March 16, 1992, pp. 24-29). After a short discussion, the bankruptcy judge concluded:

> Here is the way we will proceed on this: Number one, we'll proceed to determine factually whether this debtor, getting back to what Mr. Eagleton [Debtor's attorney] says to a threshold issue -- of whether this debtor is responsible and willfully failed. If Mr. Eagleton wins on either of those accounts, we don't need to worry about any of this. If Mr. Eagleton loses on both of these issues, then I would give the IRS an opportunity to get the DLN account, if that's important. If Mr. Eagleton loses or Donald Taylor loses, we'll have to have a hearing to determine the dollar amount and have a hearing to determine whether there is a question here that this three year statute of limitations -- in other words, you've got to assess these taxes within three years of when the return is due. If you don't assess the taxes within three years of when the return is due, you cannot assess and collect them. And number two, what you're saying is that they haven't assessed any taxes except for the last quarter.

(Transcript, pp. 28-29).

The Bankruptcy Judge found that debtor was not a responsible person who had to collect and pay the corporate taxes, so it never determined the issue of amount of taxes assessed to be paid. The United States appealed his decision, and this court reversed.

The court amends its Order of March 16, 1993 so that the last paragraph reads as follows:

The Bankruptcy Judge erred in finding that Donald P. Taylor was not a "responsible person." The decision is REVERSED and the matter is REMANDED to the Bankruptcy Court for a hearing to determine the issue of the amount of taxes for which debtor was properly assessed and for which debtor is liable.

Dated this 8th day of April, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Jack Payne, Plaintiff,	)	
v.	)	Case No. 91-C-~~556~~ 308-E
Donna E. Shalala, Secretary of Health and Human Services, Defendant.	)	

O R D E R

The Court, having considered Petitioner's Application and Motion for Final Order for Attorney Fees Under 28 U.S.C. Section 2412, the Equal Access to Justice Act (EAJA), and having reviewed the arguments and representations of counsel, finds:

1) Petitioner requests attorney fees pursuant to 28 U.S.C. Section 2412, based upon a successful challenge of Defendant's decision denying Plaintiff's Social Security Disability benefits (SSD). The parties have stipulated that $100.00 per hour for $5100.00 is a fair and reasonable amount under 28 U.S.C. Section 2412.

2) The Court finds that the Defendant's position was not substantially justified, nor reasonable as to the facts of the case in originally denying the benefits, and that an award under the EAJA is justified, and the Court hereby sustains Petitioner's Motion for attorney fees.

3) That counsel, Mark E. Buchner, for Plaintiff has expended 51.0 hours in pursuit of the Plaintiff's claim in the United States District Court for the Northern District of Oklahoma and that $100.00 per hour is a fair and reasonable hourly fee, and that a fee of $5100.00 shall be awarded to Mark E. Buchner, Attorney at Law, and costs in the amount of $22.50.

4) No attorney fee award has yet been made by the Defendant to Plaintiff's representive in the administrative proceedings before the Social Security Administration. Petitioner shall advise the Social Security Administration of this award and any request for fees related to the administrative proceedings, if any.

5) If an award of fees for work performed in this court is sought and awarded under 42 U.S.C. Section 406, Petitioner shall return to the Plaintiff the lesser of the Section 406 award or the amount awarded by this Order, pursuant to Weakley vs Bowen, 803 F.2d 575 (10th Cir., 1986).

IT IS THEREFORE SO ORDERED.

DATED this 9th day of April, 1993.

United States Judge

APPROVED:

Mark E. Buchner, OBA #1279
Petitioner and Attorney for Plaintiff
3726 South Peoria
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(918) 744-5006

Peter Bernhardt OBA No. 1741
Assistant U.S. Attorney
Northern District of Oklahoma
3600 U.S. Courthouse
Tulsa, Oklahoma 74103

IN THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OKLAHOMA

PHILLIP LEE HULL, a minor, by his natural parents, guardians and personal representatives, PHILLIP GENE HULL and TANYA LEE HULL, husband and wife, and PHILLIP GENE HULL, individually, and TANYA LEE HULL, individually,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 88-C-1645-E

JUDGMENT

This matter comes on for hearing this 31st day of March, 1993. Upon review of the record, the Court finds that it has previously awarded to plaintiff, Phillip Lee Hull, a minor, a money judgment. The agreed to amounts of the judgment are as set forth in the AGREED STATEMENT OF DAMAGE AWARDS filed November 30, 1992.

The Court further finds that there is no just reason for delay and expressly directs that entry of judgment should be had pursuant to Fed. R. Civ. P. 54(b).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that separate judgment shall be and is hereby entered in favor of plaintiff, Phillip Lee Hull, a minor, and against the United States in the amount of $8,440,534.10, plus post-judgment

239

interest at the rate of 6.09 percent per annum from June 5, 1991, until October 21, 1992.

IT IS FURTHER ORDERED that certification shall immediately be made by defendant's counsel, U.S. Department of Justice, to the U.S. General Accounting Office securing payment of this judgment and post-judgment interest to Bank IV as Trustee of Phillip Lee Hull, a minor.

IT IS FURTHER ORDERED that without prejudice to either party, any remaining issues are separated and/or bifurcated from this judgment, and reflected by separate order.

DATED this 31st day of March, 1993.

JAMES O. ELLISON, Chief
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

PHILLIP LEE HULL, a minor, by his natural parents, guardians and personal representatives, PHILLIP GENE HULL and TANYA LEE HULL, husband and wife, and PHILLIP GENE HULL, individually, and TANYA LEE HULL, individually,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 88-C-1645-E

ORDER

This matter comes on for hearing on this 31st day of March, 1993, on various motions.

Separate Judgments for money damages under Fed. R. Civ. P. Rule 54(b) have been entered for Phillip Gene Hull, Tanya Lee Hull, and Phillip Lee Hull in sums agreed upon by plaintiffs and defendant in the AGREED STATEMENT OF DAMAGE AWARDS filed November 30, 1992. The Court finds that these judgments for money damages are final.

Concerning the separate issue of interest on the money damage judgments, the Court sustains in part defendant's Fed. R. Civ. P. Rule 59 Motion filed March 4, 1993, to amend the Revised Third Amended Findings of Fact and Conclusions of Law. As requested by the Government, the Court under this Order

238

will terminate post-judgment interest on October 21, 1992, the day before the date of the mandate of affirmance per 31 U.S.C. 1304(B)(1)(A) (post-judgment interest commencing June 5, 1991, as held by the Tenth Circuit).

The Court finds that the balance of the Government's Rule 59 Motion filed March 4, 1993, is denied.

The Court further finds that the Rule 54(b) Motion of the United States, taken together with the Joint Motion for Entry of a Rule 54(b) Judgment filed December 18, 1992, is granted and the Court has entered a separate Judgment for Phillip Gene Hull and Tanya Lee Hull as aforesaid.

The Court further finds that the Motion of the United States to alter or amend the Third Amended Findings of Fact and Conclusions of Law filed February 24, 1993, has been rendered moot by the revised Third Amended Findings of Fact and Conclusions of Law filed on February 22, 1993.

The Court further finds that the motion of the United States for permission to file a reply brief will be allowed. The Court, however, stating for the record (Page 45 of the Transcript) "that if there is any way that this Court can prevent the United States from sitting on this judgment and further delaying the payment of the money into the trust, then that would be my intention to do so."

The Court further found that it was not in the position to mandamus the United States at this point (Transcript Page 17); the Court further found that it did not think that it was appropriate under these facts to attempt to resolve this

matter by mandamus (Transcript Page 43 and 44), the Court stating:

> "I'm only calling upon the good offices of Mr. Peter Bernhardt on behalf of the United States District Attorney and those people in authority who keep the keys to the vault, and call upon the United States to pay the long past due amount due this trust so that appropriate care can be given to Phillip Lee Hull, the care necessitated by the negligence which has been admitted in these proceedings by doctors who are agents of the United States. That has never been disputed, liability is admitted in this case. The Court is faced with the statement that this plaintiff is not receiving adequate medical care and I've already addressed on this record the responsibility of the Court, the process and everyone connected with this case in these delays, and I would hope that the spirit of the Court's order will be picked up by the government and that it would act expeditiously in this matter with good conscience."

The Court further finds that the money damage award set forth in the separate Judgments entered for plaintiffs is final notwithstanding plaintiffs' Petition for Writ of Certiorari and Notice of Appeal to the Tenth Circuit dealing solely with the issue of reverter provision in the trust

document, which is separate and apart from and has no effect upon the money damage award of plaintiffs.

The Court further finds that the United States shall pay expeditiously the agreed to amounts of the Judgments as separately entered for plaintiffs, the Court stating of record the following findings and urging immediate payment and avoiding further delay, namely:

(Transcript Page 17, Lines 9-15)

> "THE COURT: Well, I think that we have in this room a great deal of guilt. Guilt of this Court, guilt of the process, guilt of everyone involved in the process that it has reached the delay that it has and it's disturbing and I'm very frustrated for my own participation or omissions in expeditiously addressing the issues and I think it is obscene to further drag out this process."

(Transcript Page 18, Lines 17-25; Page 19, Lines 1-4)

> "THE COURT: What troubles me is the bureaucratic delay in the entire process. It troubles me that this young man is entitled to have his trust funded and these parents are entitled to be paid, and we're all part of a process which seems to feed on that problem and the problem needs to be resolved. They need to be paid. There are too many people who are affecting what is decent and what is right. I accept responsibility for my participation in that process. Unfortunately, the caseload is such that we have not

addressed it as expeditiously as it should have been addressed, but it is obscene for it to continue on issues that are not in dispute because of some footnote in some far off statute. We need to address what is right and get that done."

(Transcript Page 43, Line 6-13)

"THE COURT: . . . There is no issue raised by the United States that is any longer in dispute, none that have been raised in any manner because this case has gone to the Circuit court and back and it is the ultimate obscenity if further delay take place for any reason. The issue raised by the United States has been met by the Court, been granted, and I will anticipate expeditious address of the deposit with the trustee of the amount of the judgment."

(Transcript Page 48, Lines 16-24)

"THE COURT: All right, we will track it down and I will get ahold of you so we'll have a vehicle because when Mr. Bernhardt receives the money for Phillip Hull, the United States has to have an instrumentality to deposit it in. I understand. All I'm suggesting is that it would be totally wrong to have an inordinate delay while the Solicitor General addresses these issues, and I don't think there will be an inordinate delay with Mr. Bernhardt recommending payment in light

of the Court's order."

(Transcript Page 56, Lines 4-9)

"THE COURT: Nothing is more dramatic than the appearance of Phillip Lee Hull in this courtroom. He is the subject of all of the papers and all of the words and all of the actions. And to think six years have gone by since his unfortunate experience is just sort of unconscionable. I will remember it for a long time."

BE IT SO ORDERED AND ADJUDGED.

DATED this 6th day of April, 1993.

JAMES O. ELLISON, Chief
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 9 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TRUCK PARTS AND EQUIPMENT COMPANY, INC., Profit Sharing Plan,

Plaintiffs,

vs.

No. 91-C-934-E

STEVEN L. FRITZ; ROTAN MOSLE, INC., a Division of Painwebber; and PAINWEBBER, INC.,

Defendants.

ENTERED ON DOCKET
DATE APR 12 1993

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that arbitration has not been completed and further litigation is necessary.

ORDERED this 9th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNIVERSAL JOINT SPECIALISTS, INC., an Oklahoma corporation,

Plaintiff,

vs.

No. 91-C-936-E

PAINEWEBBER, INC.; ROTAN MOSLE, INC., a division of Painewebber and STEVEN L. FRITZ,

Defendants.

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that arbitration has not been completed and further litigation is necessary.

29

ORDERED this 9th day of April, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OKLAHOMA

PHILLIP LEE HULL, a minor, by his natural parents, guardians and personal representatives, PHILLIP GENE HULL and TANYA LEE HULL, husband and wife, and PHILLIP GENE HULL, individually, and TANYA LEE HULL, individually,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 88-C-1645-E

JUDGMENT

This matter comes on for hearing this 31st day of March, 1993. Upon review of the record, the Court finds that it has previously awarded to plaintiff, Phillip Lee Hull, a minor, a money judgment. The agreed to amounts of the judgment are as set forth in the AGREED STATEMENT OF DAMAGE AWARDS filed November 30, 1992.

The Court further finds that there is no just reason for delay and expressly directs that entry of judgment should be had pursuant to Fed. R. Civ. P. 54(b).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that separate judgment shall be and is hereby entered in favor of plaintiff, Phillip Lee Hull, a minor, and against the United States in the amount of $8,440,534.10, plus post-judgment

239

interest at the rate of 6.09 percent per annum from June 5, 1991, until October 21, 1992.

IT IS FURTHER ORDERED that certification shall immediately be made by defendant's counsel, U.S. Department of Justice, to the U.S. General Accounting Office securing payment of this judgment and post-judgment interest to Bank IV as Trustee of Phillip Lee Hull, a minor.

IT IS FURTHER ORDERED that without prejudice to either party, any remaining issues are separated and/or bifurcated from this judgment, and reflected by separate order.

DATED this 31st day of March, 1993.

JAMES O. ELLISON, Chief
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CRAWFORD ENTERPRISES, INC.,

Plaintiff,

vs.

DAVID L. HOWARD, d/b/a M & H GATHERING, INC., a sole proprietorship; and M & H GAS GATHERING, INC., an Oklahoma corporation,

Defendants,

vs.

ELI MASSO,

Garnishee.

Case No. CIV-83-C-859-C

JUDGMENT

The Court, having entered its Order on March 26, 1993, finding that Plaintiff, Crawford Enterprises, Inc. ("Crawford") is entitled to an award of attorney's fees in the amount of $67,240.50 against Garnishee, Eli Masso ("Masso"), orders as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is granted in favor of Crawford and against Masso for attorney's fees in the sum of $67,240.50 together with post-judgment interest at the rate of 3.21 percent per annum until the judgment is fully satisfied.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

147